IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

* * *

NO. 77-719

* * *

JEROME D. CHAPMAN, COMMISSIONER OF THE TEXAS DEPARTMENT OF HUMAN RESOURCES, ET AL.,

Petitioners

V.

HOUSTON WELFARE RIGHTS ORGANIZATION, ET AL.,

Respondents

* * *

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FIFTH CIRCUIT

* * *

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* * *

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

* * *

The Petitioner, Jerome D. Chapman, Commissioner of the Texas Department of Human Resources, et al., successors in office to Defendants—Appellees below, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals for the Fifth Circuit entered in this proceeding on July 13, 1977, rehearing denied on August 22, 1977.

OPINIONS BELOW

The opinion of the United States District Court for the Southern District of Texas granting your Petitioners' (Defendants below) motion for summary judgment,

Appendix A hereto, is reported at 391 F.Supp. 223 (S.D. Tex. 1975). The opinion of the Court of Appeals for the Fifth Circuit reversing the District Court is Appendix B hereto.

JURISDICTION

Judgment was entered by the Court of Appeals for the Fifth Circuit on July 13, 1977, and a rehearing was denied on August 22, 1977 (Appendices C and D, respectively). This Court's jurisdiction is involved under 28 U.S.C. § 1254(1), upon the basis that the opinion of the Court of Appeals for the Fifth Circuit conflicts with decisions of three other circuits as to jurisdiction, conflicts with prior decisions of this Court, and intrudes into an area of state discretion previously explicitly recognized by this Court.

QUESTIONS PRESENTED

(1) Does 28 U.S.C. § 1343(4) give federal courts jurisdiction over an action asserting that Texas' Aid to Families With Dependent Children Program failed to comply with federal requirements, under statute providing federal jurisdiction to recover damages or to secure equitable or other relief under civil rights laws?

(2) Whether the decision of the Court of Appeals for the Fifth Circuit that Texas must recalculate its standard of need in the Aid to Families With Dependent Children Program conflicts with this Court's prior ruling specifically upholding same in *Jefferson v. Hackney*, 406 U.S. 535 (1972)? Stated another way, did the Court of Appeals misinterpret this Court's ruling in *Van Lare v. Hurley*, 421 U.S. 338 (1975), to apply to a state's calculation of its standard of need in addition

to that holding's admitted applicability to determinations concerning available income?

(3) Did the decision of the Court of Appeals for the Fifth Circuit intrude into an area, the calculation of a standard of need in a state's Aid to Families With Dependent Children Program, explicitly reserved to the states by this Court in *Dandridge v. Williams*, 397 U.S. 471 (1970) and *Jefferson v. Hackney, supra?*

CONSTITUTIONAL PROVISION, STATUTES AND REGULATION INVOLVED

United States Constitution, Article 6, Clause 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws or any State to the Contrary notwithstanding.

The Civil Rights Act of 1871, 42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

The pertinent section of the Social Security Act, 42 U.S.C. § 602, is included herein as Appendix E due to its substantial length.

45 CFR § 233.90(a) (1976) provides in pertinent part:

> In establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent . . . will be considered available for children in the household in the absence of proof of actual contribution.

STATEMENT OF THE CASE

The State of Texas participates in the Aid To Families With Dependent Children Program which is administered through its Department of Human Resources, formerly the Department of Public Welfare. Prior to March 1, 1973, Texas defined three categories of need (personal needs allowance, shelter allowance and utilities allowance) with ceilings in each. The sum of the amounts determined under each category calculated for the family unit was the "standard of need." A percentage reduction, due to the limited availability of funds, of 75% was applied to the standard of need and payments were made to each recipient in the reduced amount, less any income received other than AFDC.

On March 1, 1973, Texas consolidated the above allowances into one need figure determined by the size and composition of the household. The 75% percentage reduction was retained.

Another aspect, which the Court below acknowledges was applied consistently under both plans of

determining AFDC expenditures, is Texas' policy of prorating a recipient's shelter and utility expenses in calculating the standard of need when noneligible individuals live with the recipient. This proration is made in order to take advantage of economies of scale and to prevent the State's limited financial resources available for AFDC from being diverted to the benefit of ineligible persons. Economies of scale exist, of course, as household size increases. As to the latter point, if Texas allowed the "needs" of ineligible persons to be added to the needs it recognizes for eligible persons living in the same household, the effect would be to increase the total level of assistance to a sum sufficient to satisfy their combined needs, even though some of the individuals living in the household are admittedly ineligible. It is this proration policy which was upheld by the District Court but overturned by the Court of Appeals. Both Courts found federal jurisdiction to exist pursuant to 28 U.S.C. § 1343(4).

REASONS FOR GRANTING THE WRIT

The determination of the Court of Appeals for the Fifth Circuit that there is jurisdiction in the instant cause pursuant to 28 U.S.C. § 1343(4) conflicts with the decisions of three other circuits. *Andrews v. Maher*, 525 F.2d 113 (2d Cir. 1975); *Randall v. Goldmark*, 495 F.2d 356 (1st Cir. 1974); and *Gonzales v. Young*, 46 L.W. 2064 (3rd Cir. 1977).

The Courts below used 28 U.S.C. § 1343 as a jurisdictional basis for a 42 U.S.C. § 1983 claim. Section 1983 provides a federal cause of action to redress the deprivation, under color of state law. " . . . of any rights, privileges, or immunities secured by the Constitution and laws . . ." . No clearly sufficient constitutional claim was made by Plaintiffs below; their only colorable claim was that of an alleged conflict

between state regulations and the federal Social Security Act, 42 U.S.C. § 602(a)(23), which, in turn, allegedly violates rights secured by the Supremacy Clause. The Court of Appeals for the Fifth Circuit declined to find the existence of such a claim and relied instead entirely on the statutory claim. Slip Opinion, p. 4430, footnote 1, reproduced in Appendix B.

It is this reliance upon the statutory claim, standing alone, which causes the open and acknowledged conflict between the instant Fifth Circuit opinion and those of the First, Second and Third Circuits cited above.

Additionally, the decision of the Fifth Circuit on the merits that Texas must recalculate its standard of need in the AFDC Program because of the cost-of-living requirement in 42 U.S.C. § 602(a) (23) conflicts with the prior decision of this Court in *Jefferson v. Hackney, supra.* In that case this Court determined that Texas was required under 42 U.S.C. § 602(a) (23) to meet the two broad purposes of the Act, citing *Rosado v. Wyman,* 397 U.S. 397 (1970):

> First, to require States to face up realistically to the magnitude of the public assistance requirement and lay bare the extent to which their programs fall short of fulfilling actual need; second, to prod the States to apportion their payments on a more equitable basis.

This Court then went on to find that "Texas has complied with these two requirements." *Jefferson v. Hackney, supra,* at 543-544. Nonetheless, the Fifth Circuit overturned the District Court's determination, based on *Jefferson v. Hackney, supra,* and found Texas in violation of 42 U.S.C § 602(a) (23).

In order to reach this tortured result the Fifth Circuit relied upon a misinterpretation of *Van Lare v. Hurley,*

421 U.S. 338 (1975). The message of *Van Lare* and preceding cases, *King v. Smith,* 392 U.S. 309 (1968) and *Lewis v. Martin,* 397 U.S. 552 (1970), however, is clear. Texas cannot, nor can any other state, presume a contribution of *income* that is unverified simply because an alleged "substitute father", "adult male person assuming the role of the spouse", "non-adopting stepfather", or "lodger" is present in the AFDC recipient's home. That is not what the Texas policy does.

The New York regulation overturned by this Court in *Van Lare, supra,* addresses itself to the application of "income and resources". The Texas policy, on the other hand, speaks only in terms of budgeting a standard of need. The objectionable feature of the New York regulation was a presumption of income available to the AFDC recipient. Texas' policy is totally devoid of any mention of income. It deals only with the budgetary needs of the family.

The process of determining the Texas AFDC recipient's grant went through at least four stages prior to March 1, 1973: (1) the maximum standard of need was established, (2) the number of eligible recipients and the budgetary standard of need was established, not to exceed the maximum, (3) the recognized standard of need was ascertained by application of the percentage reduction factor of 75%, and (4) an amount of non-exempt income was established and deducted from the recognized standard of need to obtain the amount of the grant. The Texas proration factor operated at the second level and did not involve a presumption of income. The New York regulation operated at the fourth level and did involve a presumption of income.

Finally, the Fifth Circuit decision intrudes into an area of state discretion, the calculation of a standard of need in AFDC, explicitly reserved to the states by this

Court in *Dandridge v. Williams*, 397 U.S. 471 (1970) and *Jefferson v. Hackney, supra.* It should be undisputed that Texas has great latitude in dispensing its available funds and that federal law does not prevent it from balancing the stresses which uniform insufficiency of payments imposes on all AFDC families against the greater ability of larger AFDC families, because of inherent economies of scale, to accommodate their needs to diminished per capita payments. *Dandridge v. Williams, supra,* at 480-481, *Jefferson v. Hackney, supra,* at 542-544. This area of state discretion has been penetrated by the Fifth Circuit and that Court has imposed its own view of what Texas' standard of need should be. Such an effort should be turned back by this Court in this case, as it has done in other cases.

CONCLUSION

The decision of the Court of Appeals for the Fifth Circuit conflicts with the decisions of three other Circuit Courts of Appeal as to jurisdiction, conflicts with prior decisions of this Court on the merits and intrudes into an area of state discretion explicitly recognized by this Court. Accordingly, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit Court of Appeals herein.

Respectfully submitted,

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PROOF OF SERVICE

I, DAVID H. YOUNG, Assistant Attorney General of Texas do hereby certify that 3 copies of the foregoing Petition for Writ of Certiorari have been served on Respondents by placing same in the United States Mail, certified, postage prepaid, addressed as follows: Mr. Jeffrey J. Skarda, 2912 Luell Street, Houston, Texas, 77093 and to Mr. John Williamson, Texas Rural Legal Aid, 305 E. Jackson Street, Suite 122, Harlingen, Texas, 78550, on this 16th day of November, 1977.

DAVID H. YOUNG
Assistant Attorney General

/s/ David M. Kendall

APPENDIX A

HOUSTON WELFARE RIGHTS ORGANIZATION, INC., et al., Plaintiffs,

v.

Raymond W. VOWELL, Commissioner of the Texas State Department of Public Welfare, et al., Defendants.
Civ. A. No. 73-H-296.

United States District Court,
S. D. Texas,
Houston Division.
Feb. 11, 1975.

Class action was brought seeking declaratory and injunctive relief on theory that manner of disbursements of AFDC funds in Texas violated federal law in disbursing funds by a flat grant system because of undervaluation of shelter and utility needs in averaging process and because of proration of shelter and utility expenses if nonrecipients shared residence of the recipient. On motions for summary judgment, the District Court, Carl O. Bue, Jr., J., held that it had jurisdiction under civil rights jurisdictional statute, that action was properly maintainable as class action, that method utilized by Texas in converting to flat grant system did not violate the Social Security Act in that maximum allowances for shelter were averaged with expenditures that met actual need but which fell below the maximum, and that proration of shelter and utility expenses did not violate the Act on theory that it assumed that income was available to reduce unmet need, that it identified a portion of total payments to be spent on shelter and utilities, or that it did not result in "fair pricing" of all elements of prior standard of need.

Defendants' motion granted; plaintiffs' motion denied.

1. Courts — 289(2)

Subject matter jurisdiction of federal district court in action under the Social Security Act could not be premised on statute providing original jurisdiction in any federal district court for "any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies." 28 U.S.C.A. § 1337; Social Security Act, § 1 et seq. 42 U.S.C.A. § 301 et seq.

2. Courts — 284(4)

Where challenge to state administration of AFDC program was premised solely on alleged violations of federal statutory provisions and not on any constitutional grounds, jurisdiction of federal district court could not be premised on statute providing for original jurisdiction in federal district court "To redress the deprivation, under color of any State law * * * or any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights * * * ." 28 U.S.C.A. § 1343 (3); Social Security Act, § 1 et seq., 42 U.S.C.A. § 301 et seq.

3. Civil Rights — 13.12(3)
Courts — 299.3(3)

Where action challenging state's administration of AFDC program sought to protect "rights of an essentially personal nature," including statutory rights concerning shelter and food, complaint stated claim cognizable under civil rights statute, and thus within subject matter jurisdiction of federal district court under statute giving court jurisdiction to hear any civil

action "under any Act of Congress providing for the protection of civil rights * * * ." 28 U.S.C.A. § 1343(4); 42 U.S.C.A. § 1983.

4. Federal Civil Procedure — 181

Action challenging state's administration of AFDC program was properly maintainable as a class action where class of recipients involved was so numerous that joinder was impracticable, there were common questions of law and fact, claims of representative parties were typical, representative parties would fairly and adequately protect the interests of the class, and defendants' actions were generally applicable to the class. Fed.Rules Civ.Proc. rule 23(b) (2), 28 U.S.C.A.

5. Social Security and Public Welfare — 194

When a state elects to participate in AFDC program, it is allowed a great deal of leeway to pay as much or little as it wishes so long as its payments are made consistent with the federal statutory scheme. Social Security Act, § 401, et seq., 42 U.S.C.A. § 601 et seq.

6. Social Security and Public Welfare — 194

Texas method of converting to a flat grant AFDC system whereby prior maximum allowances for shelter were averaged with expenditures that met actual need but which fell below the maximum, thus resulting in lower payments to recipients who had previously received the maximum, did not violate Social Security Act on theory that averaging process created a broad distortion of prior standard of need or that such method obsecured the "actual standard of need." Social Security Act, § 402(a) (23), 42 U.S.C.A. § 602(a) (23).

7. Social Security and Public Welfare — 194

The use of a flat grant system in dispensing AFDC funds is not in and of itself a violation of any federal

statutory policy. Social Security Act, § 401 et seq., 42 U.S.C.A. § 60[1] et seq.

8. Social Security and Public Welfare — 194

Requirement that components used in computing average need for purposes of converting state's AFDC program to consolidated flat grant system be "fairly priced" bars a state from artificially pricing an item so low that such item would essentially be eliminated in terms of reality, but does not require that items include in average be priced at current market value or some other measure of an ideal price. Social Security Act, § 402(a) (23), 42 U.S.C.A. § 602(a) (23).

See publication Words and Phrases for other judicial constructions and definitions.

9. Social Security and Public Welfare — 194

Section of Social Security Act requiring states to adjust standards of need to fully reflect changes in living costs and to proportionately adjust any maximums imposed is not a mandate to eliminate the use of maximums, but is only an incentive to employ a more equitable system of using a percentage reduction, and a state that chooses to continue its program of allocating maximums does not violate said section so long as it adjusts the maximum to reflect changes in living costs as of July 1, 1969. Social Security Act, § 402(a) (23), 42 U.S.C.A. § 602(a) (23).

10. Social Security and Public Welfare — 194

For purposes of requirement that state in determining average expenditures in order to convert AFDC program to flat grant system shall not obscure the actual standard of need, "actual standard of need" does not mean a standard of need as determined by

economic realities, but a standard of need as defined by the state prior to passage of section of the Social Security Act requiring adjustment in standard of need to reflect fully changes in living costs since such standards were established. Social Security Act, § 402(a) (23), 42 U.S.C.A. § 602(a) (23).

See publication Words and Phrases for other judicial constructions and definitions.

11. Social Security and Public Welfare — 194

Texas policy of prorating that portion of shelter and utility expenses attributable to noneligible individual who may be residing with AFDC recipients does not violate the Social Security Act on theory that it assumes that income is available to reduce unmet need. Social Security Act, § 402(a) (7), 42 U.S.C.A. § 602(a) (7).

12. Social Security and Public Welfare — 194

A state regulation is in conflict with federal standards governing AFDC programs if that regulation establishes an irrebuttable presumption that the income of an individual not having a legal obligation to support a recipient but residing with a recipient is utilized to meet the standard of need recognized by the state. Social Security Act, § 402(a) (7), 42 U.S.C.A. § 602(a) (7).

13. Social Security and Public Welfare — 194

Texas policy of prorating that portion of shelter and utility expenses attributable to noneligible individual who may be residing with AFDC recipients does not violate the Social Security Act on theory that it in essence identifies a portion of the payments which is required to be spent on shelter and utilities. Social Security Act, § 406(b), 42 U.S.C.A. § 606(b).

14. Social Security and Public Welfare — 194

A state may not designate AFDC funds to be spent in a particular manner. Social Security Act, § 406(b), 42 U.S.C.A. § 606(b).

15. Social Security and Public Welfare — 194

Section of Social Security Act defining term "aid to families with dependent children" as meaning "money payments with respect to * * * a dependent child or dependent children * * *" prohibits federal aid being dispensed in kind, or payments being made directly to vendors. Social Security Act, § 406(b), 42 U.S.C.A. § 606(b).

16. Social Security and Public Welfare — 194

Texas policy of prorating that portion of shelter and utility expenses attributable to noneligible individual who may be residing with AFDC recipients, in connection with conversion to flat grant system, does not violate the Social Security Act on theory that it does not result in "fair pricing" of all elements of the prior standard of need. Social Security Act, § 402(a) (23), 42 U.S.C.A. § 602(a) (23).

17. Social Security and Public Welfare — 194

Fact that level of AFDC benefits paid does not meet the standard of need that state has defined or does not meet what some may consider necessary for an adequate existence does not mean that flat grant is based on elements that were not "fairly priced." Social Security Act, § 402(a) (23), 42 U.S.C.A. § 602(a) (23).

—*—

Jeffrey J. Skarda, Houston, Tex., for plaintiffs.

John L. Hill, Atty. Gen., Austin, Tex., Penny J. Brown, Asst. Atty. Gen., for defendants.

MEMORANDUM AND OPINION

CARL O. BUE, Jr., District Judge.

In this action, plaintiffs challenge the manner in which the Texas Department of Public Welfare disburses funds under the program known as Aid to Families with Dependent Children (AFDC). The named plaintiffs, representatives of a class of welfare recipients whose welfare checks were lowered by Texas' conversion to a flat grant system on March 1, 1973, consist of the Houston Welfare Rights Organization, Inc., a non-profit corporation engaged primarily in providing welfare recipients with information as to their rights, as well as three AFDC recipients, Agnes Stafford, Dorothy Marie Phoenix and Paula Ortega, who head AFDC families. Defendants are the Commissioner of the Texas Department of Public Welfare as well as the Chairman, Vice Chairman and Secretary of the Texas State Board of Public Welfare, all of whom are sued in their individual and representative capacities.

Seeking declaratory and injunctive relief, plaintiffs allege that the manner of disbursement of AFDC funds violates federal law in two instances: (1) disbursing funds by a flat grant system rather than ascertaining the amount of each individual's needs is in violation of 42 U.S.C. § 602(a) (23) because defendants have consistently undervalued shelter and utility needs in the averaging process; (2) the Department's policy of prorating shelter and utility expenses if non-recipients share the residence of the recipient is in violation of 42 U.S.C. §§ 602(a) (7), 606(b) and 602(a) (23). This action is presently before the Court for consideration of both

plaintiffs' and defendants' motions for summary judgment.

JURISDICTION

By their complaint, plaintiffs premise federal jurisdiction upon 28 U.S.C. §§ 1337, 1343(3) and 1343(4).

[1] This Court does not find that subject matter jurisdiction of this action premised upon 28 U.S.C. § 1337 is proper. That section provides original jurisdiction in any federal district court for "any civil action or proceeding arising under any Act of Congress *regulating commerce or protecting trade and commerce against restraints and monopolies*" (emphasis added). The Social Security Act simply does not fall within the category of Congressional acts of this nature. *See* Aguayo v. Richardson, 473 F.2d 1090, 1100 (2d Cir. 1973); Almenares v. Wyman, 453 F.2d 1075, 1082 n.9 (2d Cir. 1971).

[2] Nor does the Court find that jurisdiction premised upon § 1343(3) is proper. That section provides for original jurisdiction in federal district court:

> To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, or any right, privilege or immunity secured by the Constitution of the United States or by an Act of Congress providing for equal rights . . . .

Plaintiffs do not challenge the defendants' administration of the AFDC program on any constitutional grounds. Rather, their cause of action is premised solely upon state violations of federal statutory provisions. Because provisions of the Social Security Act that provide for aid to families with dependent children are not acts "providing for equal

rights of citizens . . ." jurisdiction cannot be premised upon § 1343(3). *See* Almenares v. Wyman, *supra.*

[3] However, subject matter jurisdiction premised upon § 1343(4) is cognizable. That section gives this Court jurisdiction to hear any civil action

> To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

Thus, unlike § 1343(3), this provision does not limit federal jurisdiction to claims premised upon federal statutes "providing for equal rights of citizens." In relying upon § 1343(4), plaintiffs assert that their cause of action for violation of certain provisions of the Social Security Act is a civil rights action premised upon 42 U.S.C. § 1983,[1] for which § 1343(4) provides jurisdiction. In view of the fact that the plaintiffs in this action seek to protect" rights of an esentially personal nature," including statutory rights concerning shelter and food, the Court finds that the law of this Circuit would hold that the complaint states a claim cognizable under 42 U.S.C. § 1983. *See* Gomez v. Florida State Employment Service, 417 F.2d 569, 579 (5th Cir. 1969). *See also,* Roselli v. Afflek, 373 F.Supp. 36 (D.R.I.1974); Giguere v. Affleck, 370 F.Supp. 154 (D.R.I.1974). "Such

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[1]That Section provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

fundamental human, highly personalized rights are just the stuff from which § 1983 claims are to be made." Gomez v. Florida State Employment Service, *supra.* Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1343(4).

PROPRIETY OF A CLASS ACTION

[4] The Court finds that this action is properly maintainable as a class action, pursuant to Rule 23(b)(2), Fed.R.Civ.P. In this regard, the class of AFDC recipients who have received less benefits due to the flat grant system is so numerous that joinder is impracticable; there are common questions of law and fact among the various members of the class; the claims of the representative parties are typical of those of the class; the representative parties will fairly and adequately protect the interests of the class, and the defendants' actions are generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class.

MERITS OF THE ACTION

[5] The Federal Aid to Families with Dependent Children program, established by 42 U.S.C. § 601 et seq., involves both state and federal participation to the extent that funds provided by the state are matched by those of the federal government. State participation in the program is voluntary; however, once a state elects to participate, it must do so in a manner consistent with the federal statutory scheme. *See, e. g.*, Townsend v. Swank, 404 U.S. 282, 92 S.Ct. 502, 30 L.Ed.2d 448 (1971); Rosado v. Wyman, 397, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970); King v. Smith, 392 U.S. 309, 88 S.Ct. 2128, 20 L.Ed.2d 1118 (1968). In this regard, a state is allowed a great deal of leeway to pay as much or as little as it wishes so long as its payments are made consistent with the federal

statutory scheme. *See* Shea v. Vialpando, 416 U.S. 251, 94 S.Ct. 1746, 40 L.Ed.2d 120 (1974); Rosado v. Wyman, *supra* 397 U.S. at 408, 90 S.Ct. 1207; King v. Smith, *supra* 392 U.S. at 318-19, 88 S.Ct. 2128.

In dispensing AFDC funds, a state must first determine " a standard of need," that is, the level at which the absence of resources will make a person eligible for public assistance. Second, the state must determine a "level of benefits," that is, the portion of the recognized standard of need that will be provided. *See* Rosado v. Wyman, *supra* 397 U.S. at 408, 90 S.Ct 1207. Items included within the standard of need vary from state to state as does the level of need that is met by public assistance.

Prior to March 1, 1973. AFDC payments made by the Texas Department of Public Welfare were calculated by first determining the standard of need for each individual family unit.[2] Because Texas does not pay 100

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[2]This standard of need was defined as follows:

Personal need allowance
(1.) $65 for an adult recipient
(2.) $25 for a child under 18 years of age
(3.) $39 for a child 18-21 years of age

Rent or shelter allowance, a dollar maximum,
(1.) For private or owned housing, as paid up to,
(a.) 1-2 persons $33
(b.) 2-4 persons $44
(c.) 5 or more $50
(2.) For public or federally subsidized housing an allowance
(a.) 1 person $36
(b.) 2-4 persons $42
(c.) 5 or more $50

(continued on next page)

percent of this recognized standard of need, this first figure was then reduced by 25 percent, the level of benefits that the state is able to pay. Any income that the family received other than welfare benefits was then subtracted from this reduced figure to obtain the amount that would actually be paid.

On March 1, 1973, the Texas Department of Public Welfare converted its program of dispensing funds by determining need on the basis of each individual family unit to a system of allocating flat grants to each household, the amount being dependent upon the number of recipients within the family unit as well as the type of family unit involved, that is, whether there was within the unit a caretaker recipient or not.[3] In determining the amount of assistance that would be paid to each category, an average expenditure for each group was determined for four seasonal dates: November, 1971; February, 1972; May, 1972 and August, 1972. These seasonal figures were then averaged to determine a single figure that would be paid year round. Keeping in mind the latitude accorded the state in this program, the Court must consider

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Utilities allowed for private housing only $13
Special needs
(1.) dentures $63 once per year
(2.) chronic chiropractic care $6 per month
(3.) chronic podiatrist care $6 per month
(4.) chronic dental care $6 per month
(5.) social care up to $247.50 per month
(6.) glasses $17 once per year
(7.) hearing aids $80 once per year

[3]Monthly needs allowances under the flat grant system consist of the following:

Family size	1	2	3	4	5	6	7	8	9	10	
Non-caretaker	$32	$ 62	$ 90	$118	$146	$174	$202	$230	$258	$286	(irregular)
Caretaker	$ 0	$[illegible]5	$155	$187	$218	$246	1273	$300	$326	$353	(irregular)

plaintiffs' allegations that the conversion to a flat grant system does not comply with the federal statutory scheme upon which federal funds are dispensed.

THE USE OF SHELTER MAXIMUMS

[6] Plaintiffs allege that the method utilized by the Texas Department of Public Welfare in converting to a flat grant system violates 42 U.S.C. § 602(a) (23) in that the maximum allowances for shelter were averaged with expenditures that met actual need but which fell below the maximum, thus resulting in lower payments to recipients who had previously received the maximum. Thus, prior to converting to a flat grant system, the state had paid benefits for shelter based upon actual need only if that need was less than the "maximum" figure that the state had set. If actual need exceeded this maximum figure, only the maximum figure was paid.

Section 602(a) (23) of Title 42 requires that the state agency:

> provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted . . . .

In Rosado v. Wyman, *supra*, the Supreme Court, after reviewing the legislative history of this provision, described its purpose as twofold:

> First, to require States to face up realistically to the magnitude of the public assistance requirement and lay bare the extent to which

> their programs fall short of fulfilling actual need; second, to prod the States to apportion their payments on a more equitable basis.

Id. 397 U.S. at 412-13, 90 S.Ct. at 1218. To accomplish this purpose, the Court held that the states must:

> first, . . . re-evaluate the component factors that compose their need equation; and, second, any "maximums" must be adjusted.

However, even in light of this federal mandate, the Court in *Rosado* recognized that:

> A State may, after recomputing its standard of need, pare down payments to accommodate budgetary realities by reducing the percent of benefits paid or switching to a percent reduction system, but it may not obscure the actual standard of need.

In Jefferson v. Hackney, 406 U.S. 535, 543, 92 S.Ct. 1724, 32 L.Ed.2d 285 (1972), the Court recognized that Texas had complied with the provisions of § 602(a) (23). The same system of allocation upheld in *Jefferson* provided the figures that were averaged to arrive at a flat grant. However, plaintiffs allege that by averaging the shelter benefits for those recipients previously receiving the maximum payments for shelter with those recipients who receive less than the maximum results as a matter of necessity in those who had previously receive the maximum receiving less.

[7] The use of a flat grant system in dispensing AFDC funds is not in and of itself a violation of any federal statutory policy. *See* Rosado v. Wyman, *supra* 397 U.S. at 419, 90 S.Ct. 1207. It is recognized that such an averaging process will result in some families receiving more benefits while other families receive

less. *Id* Roselli v. Afflek, *supra*, 373 F.Supp. at 44; Johnson v. White, 353 F.Supp. 69 (D.Conn. 1969). Indeed, this is a natural result of the averaging process; those families who had previously received the largest payments will receive les, regardless of whether maximum benefits are determined through the use of a "maximum" or some other system of allocation.

[8] In *Rosado*, the Supreme Court set forth the manner in which a state may comply with § 602(a) (23) in instituting a flat grant system.

> We do not, of course, hold that New York may not, consistent with the federal statutes, consolidate items on the basis of statistical averages. . . . Providing all factors in the old equation are accounted for and fairly priced and providing the consolidation on a statistical basis reflects a fair averaging, a State may, of course, consistent with § 402(a) (23) redefine its method for determining need.

Id. 397 U.S. at 419, 90 S.Ct. at 1221. Plaintiffs appear to argue that this dicta authorizes the Court to consider whether the items include in the average were priced at their current market value or some other measure of an ideal price. The Court agrees, however, with the interpretation of the phrase "fairly priced" given by the court in New Jersey Welfare Rights Organization v. Cahill, 349 F.Supp. 501 (D.N.Y.1972), aff'd 483 F.2d 723 (3d Cir. 1973):

> By the words 'fairly priced' the Supreme Court was apparently trying to prevent a state, barred from totally climinating a factor from the content of its former standard of need, from artificially pricing an item so low that that item would essentially be eliminated in terms of reality.

New Jersey Welfare Rights Organization v. Cahill *supra* 349 F.Supp. at 511. To apply a more subjective interpretation to this term would be to accord federal courts power to interfere with determinations regarding the standard of need that the individual states are entitled under the law to make.

In the instant case, even though the benefits paid may not be based upon actual need, plaintiffs have failed to demonstrate that the state, in consolidating its need figures, either omitted a previously included item of need or artificially priced an item so low that it was essentially eliminated. Furthermore, although plaintiffs urge the Court to consider, as did the Court in Roselli v. Affleck, *supra*, if the averaging process creates a broad distortion of the prior standard of need, there has been no evidence of such a broad distortion presented to support a finding by this Court that the defendants have violated § 602(a) (23) by unfairly averaging consolidated items.[4]

[9] By way of their brief in support of their motion for summary judgment, plaintiffs appear to be arguing that the flat grant system violated § 602(a) (23) because that provision was ostensibly designed to encourage the state to abandon the use of maximums. However, it was not the purpose of that statutory provision to require that states abandon the use of such methods of determining how their respective levels of need will be

[4]Although plaintiffs have demonstrated that the largest cuts in AFDC benefits resulting from the averaging process, were expreienced by recipients living in private, as opposed to public, housing, the Court does not find that the disparity in these cuts between families of comparable size in different types of housing is so great as to create a broad distortion of an inequitable result.

met. Conversely, the statute requires only that any maximums that a state choosed to use be "updated" as of July 1, 1969. In Rosado v. Wyman, *supra* 397 U.S. at 41314, 90 S.Ct. 1207, 1218, the Court recognized that "by imposing on those States that desire to maintain 'maximums' the requirement of an appropriate adjustment, Congress has introduced an incentive to abandon a flat 'maximum' system, thereby encouraging those States desirous of containing their welfare budget to shift to a percentage system . . . "Thus, § 602(a) (23) is not a mandate to eliminate the use of maximums; it is only an incentive to employ a more equitable system of using a percentage reduction, that is a method whereby available funds are dispensed to meet a specified percentage of need as defined by the state. A state that chooses to continue its program of allocating maximums does not violate § 602(a) (23) so long as it adjusts the maximum to reflect changes in living costs of July 1, 1969. Because the State of Texas increased its maximum 11 percent to comply with this mandate, *see* Jefferson v. Hackney, *supra*, and because this increase was reflected in the shelter figures averaged to implement the flat grant system, it cannot be said that the use of these updated maximums violated § 602(a) (23).

[10] Moreover, this Court does not find as plaintiffs further argue that the use of maximums in determining average expenditures obscures "the actual standard of need" as prohibited by § 602(a) (23). *See* Rosado v. Wyman, *supra* 397 U.S. at 413, 90 S.Ct. 1207. In this regard the term "actual standard of need" does not mean a standard of need as determined by economic realities, but the standard of need as defined by the state prior to

the passage of § 602(a) (23).[5] Section 602(a) (23), as interpreted in *Rosado*, does not require that a state's standard of need be consistent with the amount that recipients actually pay to live, only that it be adjusted upward to reflect increases in the cost of living. In requiring that standards of need be updated to reflect increases in the cost of living, § 602(a) (23), merely required a state that lacked funds to increase the actual payments to recipients to lower the level of benefits paid and to refrain from camouflaging this shortcoming by tampering with its existing standard of need. Thus, one purpose ascribed to § 602(a) (23) was that of "forcing a State to accept the political consequence of [lowering the level of benefits paid] and bringing to light the true extent to which actual assistance falls short of the minimum acceptable." Rosado v. Wyman, *supra* 397 U.S. at 413, 90 S.Ct. at 1218.

In the present case, defendants have not attempted to eliminate from the standard of need any item, nor has the state lowered the standard by placing more restrictive conditions upon the ability to qualify for such benefits. *See* Rhode Island Fair Welfare Rights Organization v. Department of Social and Rehabilitative Services, 329 F.Supp. 860 (D.R.I. 1971). Thus, it cannot be said that by changing to a flat grant system defendants obscured the standard of need. *See* Johnson v. White, 353 F.Supp. 69, 78 (D. Conn. 1972).

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[5]Although the court in Roselli v. Affleck held that the state must consider economic realities in determining a consolidated needs figure of violate § 602(a) (23), this is the result of Rhode Island's practice of defining its standard of need for shelter as the actual cost of shelter born by the recipient, rather than using a maximum shelter figure. *See* Roselli v. Affleck, *supra* 373 F.Supp. at 43.

THE POLICY OF PRORATING SHELTER AND UTILITY EXPENSES

The Texas Department of Public Welfare has traditionally adhered to a policy of prorating that portion of shelter and utility expenses attributable to a non-eligible individual who may be residing with recipients. The statement of this policy that was in effect during the period November, 1971, through August, 1972, when the averaging for the flat grant system occurred, is set forth in the Texas Department of Public Welfare's Financial Services Handbook, Revision Number 23, which provides as follows:

Section 3122, paragraph 5

> When a recipient shares living arrangements with non-dependent relatives, his budget will carry his prorata share and that of his dependents of the utility charge figure, provided the non-dependent relative does not meet this expense for him.

Section 3122.3, paragraph 4, 5 and 6

> When the applicant or recipient lives with non-dependent relatives in their shelter, his prorata share(s) of the shelter expense [within the group maximum] shall be budgeted provided the non-dependent relative does not meet all this expense for him. This means that the applicant and/or recipient must actually be participating in meeting shelter expense before his prorate share(s) can be budgeted.
>
> When non-dependent relatives live with applicant in his shelter, the applicant's prorate share(s) of the shelter expenses [within the

group maximum] shall be an allowable expense, providing the non-dependent relatives do not meet this expense for him.

Regardless of the economic situation of the non-dependent relative in either of the above situations, both shelter and utilities will be budgeted only in the amount of the prorata share for the applicant and his dependents.

Under these provisions, the recipient is paid that portion of the amount he would ordinarily receive if the entire household were eligible as the number of eligible parties bears to the number of non-eligible parties. Thus, if in a group of four persons living in private housing, only two of whom are eligible for AFDC assistance, AFDC shelter payments would be determined by allocating payments of 50 percent of $44.00, the maximum for a family of four. The eligible parties would receive $22.00 as opposed to $33.00, the amount to which they would be entitled if they were living alone.

[11] Plaintiffs argue that the Texas policy of proration is in violation of 42 U.S.C. § 602(a)(7) in that it assumes that income is available to reduce unmet need. Defendants counter this argument by characterizing the proration policy as a method of determining the standard of need, which is left to the discretion of the individual state, as opposed to a method by which unmet need is reduced. Further, defendants justify the policy by arguing that it is an effective method to prevent AFDC payments from reaching the hands of individuals who are not able to receive them.

[12] Plaintiffs' argument of an inappropriate assumption of income is premised upon 42 U.S.C. § 602(a) (7) as that provision has been interpreted in 45

C.F.R. § 233.90(a) and 45 C.F.R. § 233.20(a) (3) (ii) (c):

A State Plan for . . . AFDC . . . must . . .

(ii) Provide that, in establishing financial eligibility and the amount of the assistance payment: (c) only such net income as is actually available for current use on a regular basis will be considered, and only currently available resources will be considered . . . .

See Lewis v. Martin, 397 U.S. 552, 90 S.Ct. 1282, 25 L.Ed.2d 561 (1970); King v. Smith, 392 U.S. 309, 88 S.Ct. 2128, 20 L.Ed.2d 1118 (1968). Thus, it is beyond dispute that a state regulation is in conflict with federal standards if that regulation establishes an irrebuttable presumption that the income of an individual not having a legal obligation to support a recipient but residing with a recipient is utilized to meet the standard of need recognized by the state. *See, e. g.*, Lewis v. Martin, *supra* (income of stepfather may not be presumed to be available for support of stepchildren); Solman v. Shapiro, 300 F.Supp. 409 (D. Conn. 1969). aff'd, 396 U.S. 5, 90 S.Ct. 25, 24 L.E.d.2d 5 (1969) (income of stepfather may not be presumed to be available for support of stepchildren); Reyna v. Vowell, 470 F.2d 494 (income of minor may not be presumed to be available for support of family); Gillard v. Craig, 331 F.Supp. 587 (W.D.N.C.), aff'd, 409 U.S. 807, 93 S.Ct. 39, 34, L.Ed.2d 66 (1972) (support payments to one child cannot be used to reduce assistance payable to siblings). However, it is also beyond dispute that a state has considerable discretion in determining its own standard of need. *See* King v. Smith, *supra* 392 U.S. at 318, 88 S.Ct. 2128. Thus, the question for determination is whether the proration policy operates as an assumption of income or is the method of determining the standard of need for households in which both recipients and non-recipients

reside.

In considering the similar provisions of another state, one court has held that proration policies are not an assumption of income that violates federal law. *See* Taylor v. Lavine, 497 F.2d 1208 (2d Cir. 1974); *ef.* Owens v. Parham, 350 F.Supp. 598, 605 (N.D.Ga.1972). In this regard, the policy of proration was not held to be an assumption of income, but rather a recognition of the fact that the cost of housing per person decreased with the increase in the number of persons occupying a single dwelling.

In support of their argument, plaintiffs rely heavily upon the decision in Roselli v. Affleck, *supra*, in which the district court struck down Rhode Island's method of converting to a flat grant system because pro-rated units were averaged with units in which all residents were AFDC recipients. However, the state provisions in that instance differ from those now before the Court in that the Rhode Island plan presumed that a non-recipient man assuming the role of spouse was responsible for the support of himself as well as the woman with whom he was living. Thus, the income of the non-recipient man was assumed to be available to support a recipient, an assumption clearly in violation of § 602(a) (7). In the instant case, however, the income of the non-recipient is presumed only to satisfy his own needs and not that of recipients.

From a consideration of the Texas program, the Court does not find that the proration of shelter and utility expenses operates as an assumption of income to satisfy unmet need of a recipient. Rather, the proration policy is the result of the manner in which the state has chosen to define need for shelter and utilities. In this regard, the standard of need set forth by the Texas Department of Public Welfare remains the same for an individual

living in a mixed unit as it does for an individual living in a unit in which all members are recipients. For example, during the period from which the flat grant system averages were derived, the Texas standard of need for private shelter was defined as follows:

Family of 2	$33 per month
Family of 3-4	$44 per month
Family of 5 or more	$50 per month

See Lopez v. Vowell, 5 Cir., 471 F.2d 690, 692 n. 5. Utilities were allocated per unit at a flat rate of $13 per month. Thus, the shelter needs for an individual residing in a unit of two persons is defined by the state at $16.50 per month for each person. The shelter needs for a unit of four persons defined at $11.00 per month for each person. The fact that a non-recipient resides within the unit does not diminish the payments to the individual to meet his shelter needs as recognized by the state standard of need. That is, even if one member of a unit of four persons is a non-recipient, the state will continue to attempt to meet the level of need it recognizes for those individuals who are recipients; the state will continue to pay $11.00 per recipient, which is the standard of need for an individual in a four-person unit, even though the total amount received by the unit will be less.

Plaintiffs argue that a more equitable situation would result if the state were to accord shelter benefits based upon the number of recipients in the unit, rather than the total number of persons within the unit. Thus, if in a unit of four persons, two are AFDC recipients, plaintiffs would have the state define their standard of need for shelter at $33.00 or the equivalent for a family of two recipients residing alone. However, the state has chosen to recognize the economies of scale inherent in larger

living groups, *see* Dandridge v. Williams, 397 U.S. 471, 479, 480, 90 S.Ct. 1153, 25 L.Ed.2d 491 (1970), and to define its standard of need by the size of family units as opposed to the number of recipients residing together. This Court has no power to require that the state define this standard otherwise.

The Court is cognizant that the proration provisions of New York have been struck down in the past as violative of due process because those provisions establish an irrebuttable presumption that a non-recipient contributes his pro rata share of expenses. *See* Hurley v. Van Lare, 380 F.Supp. 167 (S.D.N.Y.1974) (three-judge panel). Other courts have held proration provisions valid facially but invalid as applied. *See* Owens v. Parham, *supra;* Mothers and Children's Rights Organization, Inc. v. Stanton, 371 F.Supp 298 (N.D.Ind. 1973). *See also* Dullea v. Ott, 316 F.Supp. 1273 (D.Mass.1970). However, plaintiffs in this case have not raised, briefed or argued due process claims. There has been no evidence presented as a matter of record with regard to the manner in which the Texas program has been administered. Accordingly, this Court does not find the due process issue before it. Plaintiffs' allegations that the state's proration policy violates 42 U.S.C. § 602(a) (7), are without merit.

[13] Plaintiffs further challenge the proration policy as violative of 42 U.S.C. § 606(b):

> The term 'aid to families with dependent children' means money payments with respect to . . . a dependent child or dependent children . . . .

The purpose of this provision, as interpreted by HEW in its Handbook of Public Assistance Administration, is to provide the recipient with the right to manage his

affairs, the choice of determining how the assistance can best be used to meet his needs and the ability to make purchases through the normal channels of commerce. *See* Handbook of Public Assistance Administration § 5120. Plaintiffs argue that these provisions prohibit a state from identifying a sum of money with the requirement that it be spent in a certain manner or in restricting a part of the payment. By providing a lower payment for fixed expenses such as shelter and utility needs, plaintiffs allege that the state has in essence identified a portion of the payments to the plaintiff to be spent on shelter and utilities.

[14, 15] While plaintiffs are correct in their contention that a state may not designate AFDC funds to be spent in a particular manner, their argument that proration has this effect is without merit. Section 606(b) prohibits federal aid being dispense in kind, or payments being made directly to vendors. *See* X v. McCorkle, 333 F.Supp. 1109, 1119 (D.N.J.1970). In the instant case, however, all payments are made in money with no condition upon how the money is to be spent. The fact that a state may provide a recipient with less than he actually needs or less than the amount it defines in its standard of need is not a condition that money be spent in a particular manner. The recipient is still provided with the choice of the manner in which he will use his resources.

[16, 17] Lastly, plaintiffs challenge the proration policy as violative of 42 U.S.C. § 602(a) (23) by alleging that inclusion in the averaging for the flat grant system of the proration policy does not result in "fair pricing" of all elements of the prior standard of need.

By applying the more technical interpretation to the term "fair pricing" that the Court adopted earlier in this opinion, the Court does not find that the averaging of

prorated shelter and utility payments in determining the flat grant system violates § 402(a) (23). In so doing, the state did not artificially lower the amount that it paid to recipients who received prorated shelter expenses. In determining the flat grant shelter allowance, the state used all shelter expenditures that were actually made the year before. The fact that the level of benefits paid does not meet the standard of need that it has defined or does not meet what some may consider necessary for an adequate existence does not mean that the flat grant is based upon elements that were not "fairly priced". *See* New Jersey Welfare Rights Organization v. Cahill, *supra* 349 F.Supp. at 511.

In accordance with the foregoing defendant's motion for summary judgment is granted. Plaintiffs' motion for summary judgment is denied. Defendants will prepare and submit an appropriate judgment for entry within thirty (30) days.

APPENDIX B

HOUSTON WELFARE RIGHTS ORGANIZATION, INC., et al., Plaintiffs-Appellants,

v.

Raymond W. VOWELL, etcl., et al., Defendants-Appellees.

No. 75-2815.

United States Court of Appeals, Fifth Circuit.

July 13, 1977.

Appeal was taken from an order of the United States District Court for the Southern District of Texas, Carl O. Bue, Jr., J., 391 F.Supp. 223, holding that the Texas Department of Public Welfare's administration of the AFDC program did not violate federal law. The Court of Appeals, Gee, Circuit Judge, held that: (1) the Department of Public Welfare's policy of prorating recipients' shelter and utility expenses in calculating the standard of need when eligible individuals lived with the recipient violated federal law by presuming that the noneligible individual living with the recipient contributed toward the shelter and utility expenses, thus reducing the need of recipient, except as it applied to a recipient living with nondependent relatives in their shelter, and (2) the Department of Public Welfare's method of converting to a flat-grant AFDC system whereby prior maximum allowances for shelter were averaged with expenditures that met actual need but which fell below the maximum, thus resulting in lower payments to recipients who had previously received the maximum, did not violate the Social Security Act.

Reversed.

1. Federal Courts — 228

District court had jurisdiction over action asserting that state's administration of its program of aid to families with dependent children failed to comply with federal requirements, under statute providing federal jurisdiction to recover damages or to secure equitable or other relief under civil rights law. 28 U.S.C.A. § 1343(4).

2. Social Security and Public Welfare — 194.1

States electing to receive funds under aid to families with dependent children program must employ them in programs which do not conflict with Social Security Act. Social Security Act, § k402 as amended 42 U.S.C.A. § 602.

3. Social Security and Public Welfare — 194.13

Texas Department of Public Welfare's policy of prorating AFDC recipient's shelter and utility expenses in calculating standard of need when noneligible individual lived with recipient violated Social Security Act by presuming that noneligible individual living with recipient contributed towards shelter and utility expenses, thus reducing need of recipient, except as it applied to recipient living with nondependent relatives in their shelter. Social Security Act, § 402 as amended 42 U.S.C.A. § 602.

4. Social Security and Public Welfare — 194.14

Texas method of converting to flat-grant AFDC system whereby prior maximum allowances for shelter were averaged with expenditures that met actual need but which fell below maximum, thus resulting in lower payments to recipients who had previously received

maximum, did not violate Social Security Act. Social Security Act, § 402(a) (23) as amended 42 U.S.C.A. § 602(a) (23).

5. Social Security and Public Welfare — 194.14

In averaging process leading to flat-grant AFDC system, all factors must be fairly priced and "fairly priced" means that state may not artificially price item so low that item is essentially eliminated from standard of need. Social Security Act, § 402(a) (23) as amended 42 U.S.C.A. § 602(a) (23).

See publication Words and Phrases for other judicial constructions and definitions.

6. Social Security and Public Welfare — 194.14

In averaging process leading to adoption of flat-grant AFDC system, statistical basis used must reflect fair averaging and "fair averaging" at the very least requires technical statistical validity in state's procedures and court must look at end product of averaging process to determine whether figures produced by averaging are consistently and materially out of proportion with relevant former definition of standard of need. Social Security Act, § 402(a) (23) as amended 42 U.S.C.A. § 602(a) (23).

See publication Words and Phrases for other judicial constructions and definitions.

7. Federal Courts — 268

Eleventh Amendment barred recovery of retroactive AFDC benefits, nor could recipients recover from Texas Children's Assistance Fund and Disabled Assistance Fund on theory that those funds were separate from state treasury. Vernon's Ann.Tex.Civ.St. art. 695c, § 17(6); U.S.C.A.Const. Amend. 11.

Before GODBOLD, SIMPSON and GEE, Circuit Judges.

GEE, Circuit Judge:

[1] This appeal requires us to consider whether the state of Texas, in the administration of its program of Aid to Families with Dependent Children (AFDC), complied with federal requirements.[1] The district court concluded that the Texas Department of Public Welfare's administration of the AFDC program did not violate federal law, *see Houston Welfare Rights Organization, Inc. v. Vowell*, 391 F.Supp. 223 (S.D.Tex. 1975). Plaintiffs appeal, arguing two major points: first, that Texas' policy of budgeting only a prorata share of shelter and utility expenses when a non-AFDC recipient

[1]The nature of the plaintiffs' case requires an examination of the question of subject-matter jurisdiction. Unlike similar cases challenging state adherence to federal AFDC program requirements, plaintiffs do not challenge Texas' AFDC system on constitutional grounds that provide federal jurisdiction to hear pendent claims of statutory violation. *See, e. g., Hagans v. Lavine*, 415 U.S. 528, 536-44, 94 S.Ct. 1372, 39 L.Ed.2d 577 (1974). Plaintiffs bring a statutory action only. Nevertheless, the district court properly concluded that it had jurisdiction under 28 U.S.C. § 1343(4), which provides federal jurisdiction "[t]o recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights . . . ." In analogus contexts we have held that statutory rights concerning food and shelter are "rights of an essentially personal nature" and that plaintiffs may invoke 42 U.S.C. § 1983 to protect those rights. *See Gomez v. Florida State Employment Service*, 417 F.2d 569, 580 n. 39 (5th Cir. 1974). Although other circuits disagree, *see Andrews v. Maher*, 525 F.2d 113 (2d Cir. 1975); *Randall v. Goldmark*, 495 F.2d 356 (1st Cir. 1974), we have held that § 1983 is an "Act of Congress providing for the protection of civil rights", sufficient to invoke § 1343(4) jurisdiction. *See Gomez, supra; Hall v. Garson*, 430 F.2d 430 F.2d 430 (5th Cir. 1970).

shares a recipient's residence violates federal regulations; and second, that Texas' use of an averaging process in changing from a system of individual budgeting employing ceilings on allowable need to a consolidated flat-grant system obscured the standard of need in violation of congressional requirements. We hold that the proration policy is invalid and remand to the district court for the entry of an order mandating a re-evaluation of the standards of need established under the new system.

FACTS

[2] Aid to Families with Dependent Children (AFDC) is a public assistance program established by the Social Security Act of 1935, as amended, 42 U.S.C. § 602 (1970). AFDC provides federal matching funds to states choosing to participate in order to aid the "needy child . . . who has been deprived of parental support or care by reason of the death, continued absence from home, or physical or mental incapacity of a parent, who is living with" any of the several listed relatives. 42 U.S.C. § 606(a) (1970). States electing to receive such funds must employ them in programs which do not conflict with the Social Security Act. *Van Lare v. Hurley*, 421 U.S. 338, 340, 95 S.Ct. 1741, 44 L.Ed.2d 208 (1975); *Townsend v. Swank*, 404 U.S. 282, 92 S.Ct. 502, 30 L.Ed.2d 448 (1971).

Two aspects of federal administration of the AFDC program are of importance here. The first is a federal regulation, 45 C.F.R. § 233.90(a) (1976), that provides in part:

> In establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only of the

> parent . . . will be considered available for children in the household in the absence of proof of actual contributions.

The second is a congressional requirement imposed on participating states by 42 U.S.C. § 602(a) (23) (1970),[2] which requires that states adjust the determination of needs of individuals to reflect changes in living costs up to July 1, 1969. In *Rosado v. Wyman*, 397 U.S. 397, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970), the Supreme Court noted two reasons for this requirement:

> First, to require States to face up realistically to the magnitude of the public assistance requirement and lay bare the extent to which their programs fall short of fulfilling actual need; second, to prod the States to apportion their payments on a more equitable basis.

397 U.S. at 412-13, 90 S.Ct. at 1218.

The State of Texas participates in the AFDC program and administers it through the Texas Department of Public Welfare (DPW). Prior to March 1, 1973, Texas' AFDC program employed a combination of ceilings on allowable need and percentages of the allowable need to determine the level of benefits for recipients. The procedure is fully described in the district court's opinion, *see* 391 F.Supp. at 227-28. It sufficies to say here that the DPW defined three categories of need (personal

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[2](a) A State plan for aid and services to needy families with children must . . . .

> (23) provide that by July 1, 1969, the amount used by the State to determine the needs of individuals will have been adjusted to reflect fully charges in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted . . . .

need allowance, shelter allowance and utilities allowance), with ceilings upon each category.[3] The sum of the amounts determined under each category calculated for the family unit was the "standard of need." The DPW determined the "level of benefits" by taking 75% of this standard of need. The payment to each recipient was further decreased by any income he received other than welfare benefits. On March 1, 1973, the DPW converted its program by consolidating the various categories and standards of need to one figure determined by the size and composition of the household.[4] The level of benefits is 75% of the consolidated figure. The DPW determined the consolidated figure by averaging past standards of need for households of various sizes and compositions receiving AFDC payments. Thus, the DPW changed from a system of individualized budgets to standarized budgets with an attendant increase in administrative efficiency.

Another aspect of the Texas system of AFDC expenditure applied consistently under both plans of determining AFDC expenditure is the DPW's policy of prorating recipients' shelter and utility expenses in calculating the standard of need when noneligible

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[3]For example, the shelter allowance for one or two persons in private housing was $33; if a recipient paid more, the ceiling was $33; if he paid less, the actual amount paid determined his need.

[4]Texas accomplished this consolidation by averaging the amounts paid to the total universe of AFDC families of various sizes, in the caretaker and noncaretaker categories, for the months of November 1971, February 1972, May 1972 and August 1972. The DPW obtained the average of all families of certain size in each category for the items of personal needs, housing, utilities, glasses, dentures, hearing aids, professional care and social care.

individuals live with a recipient.[5] The proration occurs whether or not the noneligible lodger actually contributes to the shelter and utility expenses of the household. The DPW justifies the policy as recognizing the economies of scale which result when several individuals live in one shelter and as avoiding state payment of a noneligible individual's shelter and utility expense. The proration policy has the effect of lowering the recipient's allowable need so as to lower, in turn, his level of benefits.

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[5]3122 *Utilities*, paragraph 5. "When a recipient shares living arrangements with non-dependent relatives, his budget will carry his prorata share and that of his dependents of the utility chart figure, provided the non-dependent relative does not meet this expense for him."

3122.2 *Shelter*, paragraphs 4, 5 and 6. "When the applicant or recipient lives with non-dependent relatives in their shelter, his prorata share(s) of the shelter expense [within the group maximum] shall be budgeted *provided* the non-dependent relative does not meet all this expense for him. This means that the applicant and/or recipient must actually be participating in meeting shelter expense before his prorata share(s) can be budgeted.

"When non-dependent relatives live with the applicant in his shelter, the applicant's prorata share(s) of the shelter expenses [within the group maximum] shall be an allowable expense, providing the non-dependent relatives do not meet this expense for him. "Regardless of the economic situation of the non-dependent relative in either of the above situations, both shelter and utilities will be budgeted only in the amount of the prorata share of the applicant and his dependents."

Texas DPW, Financial Services Handbook, Revision No. 23.

PRORATION POLICY

[3] Plaintiffs challenge the Texas DPW's proration policy as violating 45 C.F.R. § 233.90(a) (1976) by presuming that the noneligible individual living with the recipient contributes toward the shelter and utility expenses, thus reducing the need of the recipient. The DPW responds that its policy does not presume *income* to the recipient, only reduction of the recipient's standard of need. The DPW merely presumes that the nonrecipient will pay his own way. The nonrecipient's presumed contribution to cover his expenses combined with economies of scale realized by group living indicates that the recipient's standard of need is less. The district court accepted the state's argument, but a Supreme Court decision since the district court's determination, *Van Lare v. Hurley*, 421 U.S. 338, 95 S.Ct. 1741, 44 L.Ed.2d 208 (1975), mandates a different result.

In *Van Lare*, the Supreme Court considered the effect of a New York public welfare regulation similar to that of Texas:

> A non-legally responsible relative or unrelated person in the household . . . shall be deemed to be a lodger or boarding lodger . . . . In the event a lodger does not contribute at least $15 per month, the family's shelter allowance including fuel for heating, shall be a pro rata share of the regular allowance.

18 N.Y.C.R.R. § 352.30(d). The Court found the regulations invalid "insofar as they are based on the assumption that the nonpaying lodger is contributing to the welfare household, without inquiry into whether he in fact does so." 421 U.S. at 346, 95 S.Ct. at 1747. *Van Lare* appears to control, but the state attempts to

distinguish it on the ground that the invalidated New York statutory scheme specifically presumed that the income of a lodger was devoted to his prorata share of shelter costs.

The state's attempt to distinguish *Van Lare* fails. The relevant New York statute provided in pertinent part:

18 N.Y.C.R.R. § 352.1:

(a) For applicant or recipient.

* * * * * * *

(3) When a female applicant or recipient is living with a man to whom she is not married, other than on an occasional transient basis, his available income and resources shall be applied in accordance with the following:

* * * * * * *

(iv) When the man is unwilling to assume responsibility for the woman or her children, and there are no children of which he is the acknowledged or adjudicated father, he shall be treated as a lodger in accordance with section 352.30(d).

352.30 Persons included in the budget.

* * * * * * *

(d) A non-legally responsible relative or unrelated person in the household, who is not applying for nor receiving public assistance shall not be included in the budget and shall be deemed to be a lodger or boarding lodger. The amount which the lodger or boarding lodger pays shall be verified and treated as income to the family. For the lodger,

the amount in excess of $15 per month shall be considered as income; for such boarding lodgers, the amount in excess of $60 per month shall be considered as income. *In the event a lodger does not contribute at least $15 per month, the family's shelter allowance including fuel for heating, shall be a pro rata share of the regular shelter allowance.* (emphasis supplied)

The state argues that the language of § 352.31(a)(3) ("his available income and resources shall be applied in accordance with the following") and § 352.30(d) ("The amount which the lodger or boarding lodger pays shall be verified and treated as income to the family") reveal that the New York scheme for reducing the shelter allowance prorata involved a presumption of income to the welfare family, not apresumption of reduced need. We disagree with the state's characterization of the New York approach. Although the New York scheme generally speaks of income, the relevant section in which the prorata policy appears does not explicitly presume that the nonrecipient's income will be applied to shelter expense;[6] instead, the statute implies that an AFDC family with a lodger has a reduced need for shelter so that the shelter allowance is reduced prorata. Further, in *Taylor v. Lavine*, 497 F.2d 1208 (2d Cir. 1974), the Second Circuit case later reversed in *Van Lare*, the Second Circuit upheld the New York scheme specifically on the ground urged here by Texas: that the statute merely provided a means of determining actual

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[6]In fact, the provisions mentioning income relied upon by the state refer only to the application of the income of a "man in the house." The provision struck down in *Van Lare* refers to all nonlegally responsible relatives or unrelated persons, including mothers, over-age children or sisters. These, too, qualified as lodgers with no provisions specifically mentioning that their status was a way of presuming that their income was available to the family.

need and reflected the economies of scale realized in group living. 497 F.2d at 1215-16. Because we can find no meaningful distinction between the statutory scheme struck down in *Van Lare* and the Texas DPW's proration policy, we conclude that *Van Lare* controls, and the proration policy is improper.

Even had Texas successfully distinguished the New York statutory scheme from its proration policy, the DPW's policy still runs afoul of 45 C.F.R. § 233. 90(a). The presumption that a recipient's shelter and utility expenses are lowered—creating less need— when a nonrecipient lives in the household implicitly presumes that the nonrecipient's income is available to offset his share of the shelter and utility costs. *See Hoehle v. Loking*, 405 F.Supp. 1167, 1174 (D.Minn.1975), *aff'd*, 538 F.2d 229 (8th Cir. 1976). If not, the recipient's "need," in terms of actual shelter cost, will not decrease. The DPW's claim that it is only reflecting the economies of scale enjoyed by large groups living together again implicitly presumes that the non recipient's income will be available to offset shelter and utilities. Without that presumption, the economies-of-scale argument is irrelevant. As examples, the total cost of shelter and utilities to the AFDC household has not changed; it remains in need of that amount. *See Taylor v. Lavine*, 497 F.2d 1208, 1222 (2d Cir. 1974) (Oakes, Jr., dissenting); Note, 88 HARV.L.REV. 654, 658-59 (1975). If the nonrecipient moves out, the household receives a full share even though its rent obligation has not increased. Clearly, as in *Van Lare*, "the nonpaying lodger's mere presence results in a decrease in benefits", 421 U.S. at 346, 95 S.Ct. at 1747, and "the fact that the allowance varies with the lodger's presence demonstrates that it is keyed, as the regulations plainly imply, to the impermissible assumption that the lodger is contributing income to the family." 421 U.S. at 347, 95 S.Ct. at 1748. The state's argument that it should be

allowed to avoid paying for a nonrecipient's shelter also is answered in *Van Lare:*

> Another, somewhat related, justification asserted is that the shelter allowance is reduced to prevent lodgers, who by definition are ineligible for welfare, from receiving welfare benefits. The regulations, however, do not prohibit lodgers from living in welfare homes. The lodger may stay on after the allowance is reduced, and the State takes no further action. The only victim of the state regulations is thus the needy child who suffers reduced benefits. But States may not seek to accomplish policies aimed at lodgers by depriving needy children of benefits. *King v. Smith*, supra [392 U.S. 309] at 326, 88 S.Ct. 2128, at 2138, 20 L.Ed.2d 1118; *Lewis v. Martin* [397 U.S. 552, 90 S.Ct. 1282, 25 L.Ed.2d 561 (1970)] supra.

Thus, the DPW's proration policy, in presuming that a recipeint's need decreases when a nonrecipient resides in the household, violates federal regulations controlling state administration of AFDC programs because his need of assistance does not decrease unless the nonrecipient is paying his own way.

This does not mean that the entire proration policy is invalid, however. When a recipient lives with nondependent relatives in their shelter, the DPW recognizes his need only to the extent of the recipient's prorata share of shelter and utility costs. This policy does attempt to assess the need of the recipient and does not unlawfully presume the availability of income to him. Both justifications of the proration policy as an assessment of need validly apply. Economies of scale are realized, as the recipient adds to the group living in the shelter and reduces the per capita shelter cost. Paying to the recipient a prorata share of the flat grant for that

size household properly prevents state payment of welfare benefits to noneligible individuals. This policy does not presume that income is available to the recipient because the recipient receives his prorata share *unless* the nondependent relative meets that expense for him. The nondependent relative is liable for the shelter or utility cost; the state's policy prevents relatives' attempts to profit by charging disproportionate rents to children in no position to protect themselves. *Johnson v. White*, 528 F.2d 1228, 1237 (2d Cir. 1975). In this situation, then, the DPW's proration policy is valid.

CONSOLIDATION TO FLAT-GRANT SYSTEM

[4] The plaintiffs also challenge the averaging process employed in Texas' change to a flat-grant AFDC system. In *Rosado v. Wyman*, 397 U.S. 397, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970), the Supreme Court recognized that a state may employ an averaging process to redefine its method for determining need as long as "all factors in the old equation are accounted for and fairly priced and providing the consolidation on a statistical basis reflects a fair averaging . . . ." 397 U.S. at 419, 90 S.Ct. at 1221. Our only concern in this process is preventing the state from obscuring the standard of need updated to June 1, 1969 levels as required by Congress in § 602(a) (23). Plaintiffs claim that Texas' consolidation obscured the standard of need.

Insofar as the Texas DPW's proration policy is invalid, the policy's existence at the time Texas computed the statistical averages that let to the flat grant inevitably skewed the averages downward. The proration policy, when applicable, always reduced the allowances for shelter and utilities, foreclosing the possibility of fairly pricing the standard of need for shelter and utilities. Although it is possible that a state

policy that foreclosed fair pricing of one of the factors of the standard of need would have a *de minimis* effect, Texas implicitly concedes the substantial impact of its policy on the averaging. The state's brief remarks that our invalidation of the proration policy would necessitate a new averaging for the budgetary standard of need. As we have concluded that the DPW's proration policy did not comply with federal requirements, Texas must recalculate its budgetary standard of need for its flat-grant system.[7]

Since plaintiffs challenge other averaging procedures which Texas may wish to employ in its new determination, we consider these as well. Plaintiffs complain of two other aspects of DPW's consolidation to a flat-grant system: first, that the DPW averaged in amounts paid to AFDC households with actual shelter needs below the ceilings set by the DPW but averaged in AFDC households with actual shelter needs above the DPW ceilings at the ceiling amount; and second, the DPW averaged in AFDC households with no shelter expense at all. Plaintiffs argue that these procedures unduly obscured the standard of need required by Congress in § 602(a) (23).

To understand the plaintiff's objection to Texas' averaging process, one must understand the components of the averaging. Before converting to a flat-grant system, Texas employed ceilings in its shelter

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[7]We grant Texas a reasonable time to recalculate its budgetary standard of need. As an interim measure, Texas may employ the present budgetary standard of need figures without, of course, utilizing the proscribed proration policy. For example, Texas may wish to restrict its definition of "household" to include only AFDC recipients and a caretaker, if a caretaker is in the household.

allowances under its standard of need. These ceilings reflected Texas' assessment, by means of original cost studies gradually updated, of minimum shelter needs, i.e., those necessary "to provide a reasonable subsistence compatible with decency and health." Tex.Rev.Civ.Stat.Ann. art 695c, § 17(6) (Supp. 1977). These ceilings were properly updated to reflect the cost of living at 1969 levels as required by Congress in 42 U.S.C. § 602(a) (23) (1970). *See Jefferson v. Hackney*, 406 U.S. 535, 543, 92 S.Ct. 1724, 32 L.Ed.2d 285 (1972) (Texas' 11% increase in ceilings complied with § 602(a) (23) requirements). Not all families were allowed the ceiling amounts because their actual shelter needs were less; those families were allowed only amounts equal to their actual shelter cost. This system allowed Texas to meet § 602(a) (23) requirements but to keep welfare costs down by allowing less than the ceilings to those who needed less—and so paying lower levels of benefits. When the state averaged its payments to AFDC recipients to determine the amount it should pay in a flat grant, the averaging included families which received only the ceiling amount for shelter and families which received their actual shelter expenses that were less than the ceiling amount. The inevitable result of this process was to produce an averaged figure lower than that of the original ceiling. Plaintiffs complain that this averaging procedure unduly obscured the standard of need.[8]

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[8]Although plaintiffs also protest the inclusion of households with zero shelter expense in the averaging, we do not view this policy as a special case. Of course, insofar as the zero or extremely low shelter expenses derived from the proration policy, they unduly obscured the standard of need. In those cases where the zero shelter need resulted from living in homes not mortaged or rent-free, inclusion of those households in the averaging process was proper. This actual housing cost is zero and is just as relevant as that of the family with extremely low shelter expenses. The difference is only one of degree, not of kind.

Whether Texas' averaging using shelter ceilings violated § 602(a) (23) presents a close and complex question. Resolution of that question requires that we first explore the criteria employed by the Supreme Court in evaluating averaging procedures and then examine the extent to which we may go behind the operation of statistical analysis to examine the result of the procedures. As we noted earlier, *Rosado* clearly authorizes averaging as a process leading to a flat-grant system as long as "all factors in the old equation are accounted for and fairly priced and providing the consolidation on a statistical basis reflects a fair averaging . . . ." 397 U.S. 419, 90 S.Ct. at 1221. Definition of the Delphic terms "fair pricing" and "fair averaging" is a prerequisite to meaningful analysis.

[5] That items included in the standard of need by "fairly priced" means only that a state may not artificially price an item so low that the item is essentially eliminated from the standard of need. See *New Jersey Welfare Rights Organization v. Cahill*, 349 F.Supp. 501, 510 (D.N.J.1972), *aff'd*, 483 F.2d 723 (ed Cir. 1973). This definition follows from *Rosado's* proscription of a state's reducing the content of its standard of need. *See* 397 U.S. at 417, 90 S.Ct. 1207. Severe reduction of the price of an item would accomplish the same result as not even considering the item in the standard of need. This definition allows us to examine for violations of § 602(a) (23) egregious manipulations of the standard of need by price reduction, but forces us to recognize that a state—as long as it has complied with § 602(a) (23), as Texas has done—has considerable leeway in determining the proper price for items in its standard of need.

[6] The definition of "fair averaging" has proved more elusive. In the contest in which *Rosado* employed the term— "providing the consolidation on a statistical

basis reflects a fair averaging," 397 U.S. at 419, 90 S.Ct. at 1221—it is clear that "fair averaging" at the very least requires technical statistical validity in the state's procedures. *See New Jersey Welfare Rights Organization v. Cahill, supra* at 510 F.2d 1228 (2d Cir. 1975), the Second Circuit invalidated a portion of Connecticut's conversion to a flat-grant system when it found that Connecticut had employed a sample too small to produce a statistically meaningful average. 528 F.2d at 1238-40. Not only do we endorse this approach to the fair-averaging definition,but we also view "fair averaging" in a broader context not tied to the Supreme Court's use of those terms. Like the district court in *Roselli v. Affleck*, 373 F.Supp. 36 (D.R.I.), *aff'd*, 508 F.2d 1277 (1st Cir. 1974), we "must look at the end product of the averaging process to determine whether the figures produced by the averaging are consistently and materially out of proportion with the relevant former definition of 'standard of need'." 373 F.Supp. at 44. Examining Texas' averaging approach, we find no violations of either of these criteria.

Texas fairly priced shelter needs when it included the amounts actually paid to welfare families during the relevant periods. It is true that those families who received the ceiling amounts might have had greater shelter needs that reflected in the ceiling amounts, but a state is entitled to some flexibility in assessing a fair price for shelter needs. These ceilings have already met the requirements of 42 U.S.C. § 602(a) (23). *See Jefferson v. Hackney, supra.* We cannot say that a price that meets § 602(a) (23)'s criteria is so artificially low that it is eliminated from the standard of need of those families included in the averaging.

Texas fairly averaged in its statistical analysis. Plaintiffs do not assert that Texas omitted any factor of the old standard of need equation in its calculations.

unlike New York's omission of a "special grants" category in *Rosado.* Texas averaged the amounts actually paid to all AFDC households of various sizes and compositions on four separate occasions in 1972. *See* n. 4, *supra.* The technical basis for the DPW's statistical analysis—the size of the sample, the timing of the samples, etc.—appears unassailable. To some extent the DPW's use of ceilings in the averaging process produced figures less than the maximum standard of need recognized by the DPW, but the reduction was not significant. After the institution of the new system, Texas paid out almost exactly the same amount of money as under the old system. Texas' averaging process produced no broad distortion in the former standard of need that would lead to condemnation under § 602(a) (23).

RETROACTIVE RECOVERY

[7] Plaintiffs also seek recovery of retroactive AFDC benefits. Their claims are foreclosed by the eleventh amendment. *See Edelman v. Jordan*, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). Plaintiffs argue that the Children's Assistance Fund and the Disabled Assistance Fund created by Tex.Rev.Civ.Stat.Ann. art 594c, § 27(1) (1976) Supp.) are funds separate from the state treasury so that *Edelman* does not apply. They rely on *Bowen v. Hackett*, 387 F.Supp. 1212 (D.R.I.1975), which held that the eleventh amendment did not bar a recovery against a state unemployment fund financed solely by employers' contributions. In our case, however, the separate funds created for public welfare programs are only a matter of bookkeeping convenience: they are still funded by the state so that any award would resemble too closely a money judgment against the state itself. *See Edelman, supra* at 665, 94 S.Ct. 1347. Plaintiffs are entitled to no damage recovery.

CONCLUSION

A major part of the DPW's proration policy violates 45 C.F.R. § 233.90(a). The violation infected the averaging process so as to require a new evaluation of the proper standard of need. In making this reevaluation, Texas is free to use the averaging procedure first employed as long as it purges that procedure of the proration taint. During a reasonable period for recalculating the chart figure, Texas may employ the flat'grant figures in present charts without, of course, employing the proscribed aspect of the proration policy.

REVERSED.

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

October Term, 1976

No. 75-2815

D.C. Docket No. CA-73-H-296

HOUSTON WELFARE RIGHTS ORGANIZATION, ET AL., ETC.,

Plaintiffs-Appellants,

versus

RAYMOND W. VOWELL, Commissioner of the Texas State Department of Public Welfare, ET AL., ETC.,

Defendants-Appellees.

Appeal from the United States District Court for the **Southern District of Texas**

Before **GODBOLD, SIMPSON and GEE, Circuit Judges.**

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the **Southern District of Texas, and was argued by counsel;**

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, **reversed;**

It is further ordered that defendants-appellees pay to plaintiffs-appellants, the cost on appeal to be taxed by the Clerk of this Court.

July 13, 1977

Issued as Mandate:

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

NO. 75-2815

HOUSTON WELFARE RIGHTS ORGANIZATION, ET AL.,

Plaintiffs-Appellants,

versus

RAYMOND W. VOWELL, Commissioner of the Texas State Department of Public Welfare, ET AL., ETC.,

Defendants-Appellees.

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Appeal from the United States District Court for the Southern District of Texas

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ON PETITION FOR REHEARING

(August 22, 1977)

Before GODBOLD, SIMPSON and GEE, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed in the above entitled and numbered cause be and the same is hereby *denied.*

ENTERED FOR THE COURT:

S/S

United States Circuit Judge

APPENDIX E

§ 602. State plans for aid and services to needy families with children; contents; approval by Secretary

(a) A State plan for aid and services to needy families with children must (1) provide that it shall be in effect in all political subdivisions of the State, and, if administered by them, be mandatory upon them; (2) provide for financial participation by the State; (3) either provide for the establishment or designation of a single State agency to administer the plan, or provide for the establishment or designation of a single State agency to suprevise the administration of the plan; (4) provide for granting an opportunity for fair hearing before the State agency to any granting an opportunity for a fair hearing before the State agency to any individual whose claim for aid to families with dependent children is denied or is not acted upon with reasonable promptness; (5) provide such methods of administration (including after January 1, 1940, methods relating to the establishment and maintenance of personnel standards on a merit basis, except that the Secretary shall exercise no authority with respect to the selection, tenure of office, and compensation of any individual employed in accordance with such methods) as are found by the Secretary to be necessary for the proper and efficient operation of the plan; and (6) provide that the State agency will make such reports, in such form and containing such information, as the Secretary may from time to time require, and comply with such provisions as the Secretary may from time to time find necessary to assure the correctness and verification of such reports; (7) except as may be otherwise provided in clause (8), provide that the State agency shall, in determining need, take into consideration any other income and resources of any

child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income; (8) provide that, in making the determination under clause (7), the State agency—

(A) shall with respect to any month disregard—

(i) all of the earned income of each dependent child receiving aid to families with dependent children who is (as determined by the State in accordance with standards prescribed by the Secretary) a full-time student or part-time student who is not a full-time employee attending a school, college, or university, or a course of vocational or technical training designed to fit him for gainful employment, and

(ii) in the case of earned income of a dependent child not included under clause (i), a relative receiving such aid, and any other individual (living in the same home as such relative and child) whose needs are taken into account in making such determination, the first $30 of the total of such earned income for such month plus one-third of the remainder of such income for such month (except that the provisions of this clause (ii) shall not apply to earned income derived from participation on a project maintained under the programs established by section 532(b) (2) and (3) of this title); and

(B) (i) may, subject to the limitations prescribed by the Secretary, permit all or any portion of the earned or other income to be set aside for future identifiable needs of a dependent child, and

(ii) may, before disregarding the amounts referred to in subparagraph (A) and clause (i) of this subparagraph, disregard not more than $5 per month of any income;

except that, with respect to any month, the State agency shall not disregard any earned income (other than income referred to in subparagraph (B)) of—

(C) any one of the persons speficied in clause (ii) of subparagraph (A) if such person—

(i) terminated his employment or reduced his earned income without good cause within such period (of not less than 30 days) preceding such month as may be prescribed by the Secretary; or

(ii) refused without good cause, within such period preceding such month as may be prescribed by the Secretary, to accept employment in which he is able to engage which is offered through the public employment offices of the State, or is otherwise offered by an employer if the offer of such employer is determined by the State or local agency administering the State plan, after notification by him, to be a bona fide offer of employment; or

(D) any of such persons specified in clause (ii) of subparagraph (A) if with respect to such month the income of the persons so specified (within the meaning of clause (7) was in excess of their need as determined by the State agency pursuant to clause (7) (without regard to clause (8)), unless, for any one of the four months preceding such month, the needs of such persons were met by the furnishing of aid under the plan;

(9) provide safeguards which restrict the use of[1] disclosure of information concerning applicants or recipients to purposes directly connected with (A) the administration of the plan of the State approved under this part, the plan or program of the State under part B, C, or D of this subchapter or under subchapter I, X, XIV, XVI, XIX, or XX of this chapter, or the supplemental security income program established by subchapter XVI of this chapter, (B) any investigation, prosecution, or criminal or civil proceeding, conducted in connection with the administration of any such plan or program, and (C) the administration of any other Federal or federally assisted program which provides assistance, in cash or in kind, or services, directly to individuals on the basis of need; and the safeguards so provided shall prohibit disclosure, to any committee or a legislative body, of any information which identifies by name or address any such applicant or recipient; (10) provide, effective July 1, 1951, that all individuals wishing to make application for aid to families with dependent children shall have opportunity to do so, and that aid to families with dependent children shall, subject to paragraphs (25) and (26), be furnished with reasonable promptness to all eligible individuals; (11) provide for prompt notice (including the transmittal of all relevant information) to the State child support collection agency (established pursuant to part D of this title) of the furnishing of aid to families with dependent children with respect to a child who has been deserted or abandoned by a parent (including a child born out of wedlock without regard to whether the paternity of such child has been established); (12) provide, effective October 1, 1950, that no aid will be furnished any individual under the plan with respect to any period with respect to which he is receiving old-age assistance under the State plan approved under section 302 of this title;

(13), (14) Repealed. Pub. L. 93-647, § 3(a) (2), Jan. 4, 1975, 88 Stat. 2348.

(15) provide as part of the program of the State for the provision of services under subchapter XX of this chapter (A) for the development of a program, for each appropriate relative and dependent child receiving aid under the plan and for each appropriate individual (living in the same home as a relative and child receiving such aid) whose needs are taken into account in making the determination under clause (7), for preventing or reducing the incidence of births out of wedlock and otherwise strengthening family life, and for implementing such program by assuring that in all appropriate cases (including minors who can be considered to be sexually active) family planning services are offered to them and are provided promptly (directly or under arrangements with others) to all individuals voluntarily requesting such services, but acceptance of family planning services provided under the plan shall be voluntary on the part of such members and individuals and shall not be a prerequisite to eligibility for or the receipt of any other service under the plan; and (B) to the extent that services provided under this clause or clause (14) are furnished by the staff of the State agency or the local agency administering the State plan in each of the political subdivisions of the State, for the establishment of a single organizational unit in such State or local agency, as the case may be, responsible for the furnishing of such services; (16) provide that where the State agency has reason to believe that the home in which a relative and child receiving aid reside is unsuitable for the child because of the neglect, abuse, or exploitation of such child it shall bring such condition to the attention of the appropriate court or law enforcement agencies in the State, providing such data with respect to the situation it may have;

(17), (18) Repealed. Pub.L. 93—647, § 101(c) (8), Jan. 4, 1975, 88 Stat. 2360.

(19) provide—

(A) that every individual, as a condition of eligibility for aid under this part, shall register for manpower services, training, and employment as provided by regulations of the Secretary of Labor, unless such individuals is—

(i) a child who is under age 16 or attending school full time;

(ii) a person who is ill, incapacitated, or of advanced age;

(iii) a person so remote from a work incentive project that his effective participation is precluded;

(iv) a person whose presence in the home is required because of illness or incapacity of another member of the household;

(v) a mother or other relative of a child under the age of six who is caring for the child; or

(vi) the mother or other female caretaker of a child, if the father or another adult male relative is in the home and not excluded by clause (i), (ii), (iii), or (iv) of this subparagraph (unless he has failed to register as required by this subparagraph, or has been found by the Secretary of Labor under section 633 (g) of this title to have refused without good cause to participate under a work incentive program or accept employment as described in subparagraph (F) of this paragraph);

and that any individual referred to in clause (v) shall be advised of her option to register, if she so desires, pursuant to this paragraph, and shall be

informed of the child care services (if any) which will be abailable to her in the event she should decide so to register;

(B) that aid under the plan will not be denied by reason of such registration or the individual's certification to the Secretary of Labor under subparagraph (G) of this paragraph, or by reason of an individual's participation on a project under the program established by section 632(b) (2) or (3) of this title;

(C) for arrangements to assure that there will be made a non-Federal contribution to the work incentive programs established by part C by appropriate agencies of the State or private organizations of 10 per centum of the cost of such programs, as specified in section 635(b) of this title;

(D) that (i) training incentives authorized under section 634 of this title and income derived from a special work project under the program established by section 632(b) (3) of this title shall be disregarded in determining the needs of an individual under section 602(a) (7) of this title, and (ii) in determining such individual's needs the additional expenses attributable to this participation in a program established by section 632(b) (2) or (3) of this title shall be taken into account;

(E) Repealed. Pub.L. 92-223, § 3(a) (5), Dec. 28, 1971, 85 Stat. 804.

(F) that if and for so long as any child, relative, or individual (certified to the Secretary of Labor pursuant to subparagraph (G)) has been found by the Secretary of Labor under section 633 (g) of this title to have refused without good cause to participate under a work incentive program

established by part C with respect to which the Secretary of Labor has determined his participation is consistent with the purposes of such part C, or to have refused without good cause to accept employment in which he is able to engage which is offered through the public employment offices of the State, or is otherwise offered by an employer if the offer of such employer is determined, after notification by him, to be a bona fide offer of employment—

(i) if the relative makes such refusal, such relative's needs shall not be taken into account in making the determination under clause (7), and aid for any dependent child in the family in the form of payments of the type described in section 606(b) (2) of this title (which in such a case shall be without regard to clauses (A) through (E) thereof) or section 608 of this title will be made;

(ii) aid with respect to a dependent child will be denied if a child who is the only child receiving aid in the family makes such refusal;

(iii) if there is more than one child receiving aid in the family, aid for any such child will be denied (and his needs will not be taken into account in making the determination under clause (7)) if that child makes such refusal; and

(iv) if such individual makes such refusal, such individual's needs shall not be taken into account in making the determination under clause (7);

except that the State agency shall, for a period of sixty days, make payments of the type described in

section 606 (b) (2) of this title (without regard to clauses (A) through (E) thereof) on behalf of the relative specified in clause (i), or continue aid in the case of a child specified in clause (ii) or (iii), or take the individual's needs into account in the case of an individual specified in clause (iv), but only if during such period such child, relative, or individual accepts counseling or other services (which the State agency shall make available to such child, relative, or individual) aimed at persuading such relative, child, or individual, as the case may be, to participate in such program in accordance with the determination of the Secretary of Labor; and

(G) that the State agency will have in effect a special program which (i) will be administered by a separate administrative unit and the employees of which will, to the maximum extent feasible, perform services only in connection with the administration of such program, (ii) will provide (through arrangements with others or otherwise) for individuals who have been registered pursuant to subparagraph (A), in accordance with the order of priority listed in section 633(a) of this title, such health, vocational rehabilitation, counseling, child care, and other social and supportive services as are necessary to enable such individuals to accept employment or receive manpower training provided under part C, and will, when arrangements have been made to provide necessary supportive services, including child care, certify to the Secretary of Labor those individuals who are ready for employment or training under part C, (iii) will participate in the development of operational and employability plans under section 633(b) of this title; and (iv) provides for purposes of clause (ii), that, when more than one kind of child care is

available, the mother may choose the type, but she may not refuse to accept child care services if they are available;

(20) effective July 1, 1969, provide for aid to families with dependent children in the form of foster care in accordance with section 608 of this title;

(21), (22) Repealed. Pub.L. 93—647, § 101(c) (8), Jan 4, 1975, 88 Stat. 2360.

(23) provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted; (24) provide that if an individual is receiving benefits under subchapter XVI of this chapter, then, for the period for which such benefits are received, such individual shall not be regarded as a member of a family for purposes of determining the amount of benefits of the family under this subchapter and his income and resources shall not be counted as income and resources of a family under this subchapter; (25) provide (A) that, as a condition of eligibility under the plan, each applicant for or recipient of aid shall furnish to the State agency his social security account number (or numbers, if he has more than one such number), and (B) that such State agency shall utilize such account numbers, in addition to any other means of identification it may determine to employ in the administration of such plan; (26) provide that, as a condition of eligibility for aid, each applicant or recipient will be required—

(A) to assign the State any rights to support from any other person such applicant may have (i) in his own behalf or in behalf of any other family member

for whom the applicant is applying for or receiving aid, and (ii) which have accrued at the time such assignment is executed,

(B) to cooperate with the State (i) in establishing the paternity of a child born out of wedlock with respect to whom aid is claimed, and (ii) in obtaining support payments for such applicant and for a child with respect to whom such aid is claimed, or in obtaining any other payments or property due such applicant or such child, unless (in either case) such applicant or recipient is found to have good cause for refusing to cooperate as determined by the State agency in accordance with standards prescribed by the Secretary, which standards shall take into consideration the best interests of the child on whose behalf aid is claimed; and that, if the relative with whom a child is living is found to be ineligible because of failure to comply with the requirements of subparagraphs (A) and (B) of this paragraph, any aid for which such child is eligible will be provided in the form of protective payments as described in section 406(b) (2) (without regard to subparagraphs (A) through (E) of such section);

(27) provide, that the State has in effect a plan approved under part D and operate a child support program in conformity with such plan; and (28) provide that, in determining the amount of aid to which an eligible family is entitled, any portion of the amounts collected in any particular month as child support pursuant to a plan approved under part D of this subchapter and retained by the State under section 657 of this title, which (under the State plan approved under this part as in effect both during July 1975 during that particular month) would not have caused a reduction in the amount of aid paid to the family if such amounts had been paid directly to the family, shall be added to the amount of aid

otherwise payable to such family under the State plan approved under this part.

(b) The Secretary shall approve any plan which fulfills the conditions specified in subsection (a) of this section, except that he shall not approve any plan which imposes as a condition of eligibility for aid to families with dependent children, a residence requirement which denies aid with respect to any child residing in the State (1) who has resided in the State for one year immediately preceding the application for such aid, or (2) who was born within one year immediately preceeding the application, if the parent or other relative with whom the child is living has resided in the State for one year immediately preceding the birth.

(c) The Secretary shall, on the basis of his review of the reports received from the States under clause (15) of subsection (a) of this section, compile such data as he believes necessary and from time to time publish his findings as to the effectiveness of the programs developed and administered by the States under such clause. The Secretary shall annually report to the Congress (with the first such report being made on or before July 1, 1970) on the programs developed and administered by each State under such clause (15).

APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

NO. 77-719

JEROME D. CHAPMAN, COMMISSIONER OF THE TEXAS DEPT. OF HUMAN RESOURCES, ET AL.,

—v.—

HOUSTON WELFARE RIGHTS ORGANIZATION, ET AL.,

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED NOVEMBER 21, 1977
CERTIORARI GRANTED FEBRUARY 21, 1978

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Article II

FIRST AMENDED COMPLAINT

Count one, para. 1—This first count asking for declaratory and injunctive relief is brought because plaintiffs seek to enjoin the implementation of the single figure needs allowance which began March 1, 1973, by the Texas State Depar.ment of Public Welfare. The single figure needs allowance significantly reduced grants for substantial numbers of recipients of Aid to Families with Dependent Children (AFDC) and unfairly worked against the smaller families.

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Jurisdiction, para. 3—Jurisdiction is conferred on this court by 28 U.S.C. §1343 (3 & 4) and §1337.

***

Jurisdiction, para. 4—Plaintiffs' action for declaratory and injunctive relief, and for damages, is authorized by 28 U.S.C. §2201 and Rule 57 of the Federal Rules of Civil Procedure, which relate to declaratory judgments, and by 42 U.S.C. §1983, which provides redress for the deprivation under color of state law of rights, privileges and immunities secured to all citizens and persons within the jurisdiction of the United States by the laws of the United States.

***

Class action allegation, para. 9 & 10—The named plaintiffs bring this action on behalf of their members as in the case of the Houston Welfare Rights Organization, Inc., and on their behalf as in the case of the families of plaintiffs, and pursuant to Rule 23(a) & (b)(2) of the Federal Rules of Civil Procedure on behalf of all other persons similarly situated.

The AFDC class relevant for the first count contains all those persons who are recipients of AFDC whose checks were reduced or whose eligibility was terminated by implementation of the single figure needs allowance under §3130 of the Texas State Department of Public Welfare, Financial Services Handbook (11/72) (FSH 3130) and form 36 of the Texas State Department of Public Welfare Forms manual (11/72). As to this class, the requirements of Rule 23 are met in that the class is so numerous that joinder of all members is impractical; there are questions of law and fact common to the class; the claims of the representative parties will fairly and adequately

protect the interests of the class; and the defendants have acted on grounds generally applicable to the class, thereby making appropriate final and injunctive and declaratory relief with respect to the class as a whole. Factual allegations, para. 17 through 59—

***

17. Plaintiff Houston Welfare Rights Organization, Inc., is a nonprofit corporation of low income people residing in Harris County, Texas. It was originally organized in January, 1969, in response to the welfare cuts announced for that May. In 1971, it incorporated and today it has some 200 dues paying members and another 200 associate members. The purposes of the organization include providing welfare recipients and the low income people of Harris County with proper information of their rights and working for the prevention of injustice. A substantial amount of its work and its membership comes from recipients of AFDC. This purpose was adversly affected by the actions of defendants.

18. Plaintiff Agnes Stafford heads a family composed of a fourteen year old child, Don Littleton. Doing the best she could in February, 1973, she budgeted $17 for rent in a public housing project, about $2 for utilities, $21 for food stamps, $7 for telephone, $20 for school and other expenses such as furniture, medical costs and transportation from her $87 Veterans Administration pension and $12 AFDC check. When her AFDC grant was terminated, she lost medicaid in addition to having great difficulty meeting her family's needs.

19. First plaintiffs received notice on Monday, February 12, 1973, which told her she would be denied AFDC on March 1, 1973, because of budgeting changes. Defendants denied plaintiff according to that schedule.

20. On May 14, 1973, first plaintiffs were partially restored to AFDC. Defendants reinstated the child only and certified him for $24 per month as a noncaretaker family. Although this constitutes an overall increase in income, Agnes Stafford still has been denied medicaid and automatic food stamp eligibility because of the budgeting changes.

21. Plaintiff Dorothy Marie Phoenix of the second family of plaintiffs raises three children--Cardell Smith, 8 years old; Theresa Phoenix, 6 years old; Mary Phoenix, 3 years old.

22. Second plaintiffs had established a monthly budget for February, 1973, of $92 rent, $26 furniture payment, $25 food stamp price and other miscellaneous expenses, especially clothing. They tried to meet these expenses on a monthly AFDC check of $148.

23. Second plaintiffs received notice on February 12, 1973, which stated that their check would be reduced to $140 on March 1, 1973. Defendants did reduce their grant that amount.

24. Plaintiff Paula Ortega heads the third family of plaintiffs raising her child Reymundo Ortega, 11 years of age. In February, 1973, she received an AFDC check of $89 for that purpose.

25. Third plaintiffs live with Maria San Juana Ortega, the sister of Paula Ortega, who is a recipient of Aid to the Permanently and Totally Disabled (APTD) from defendants. She is disabled because of birth defects and receives a $91 APTD grant. She is also the legal ward of Paula Ortega, her guardian.

26. Third plaintiffs also live with Josefina Ortega, the mother of Paula Ortega, who is not a recipient of State Welfare and has no income of her own.

27. Third plaintiffs out of their AFDC check and in managing the APTD grant of Maria San Juana Ortega paid the following monthly expenses: a house note of $51.33 per month, $47 for food stamps, $30 car expenses, $20 loan for tires, $15 for furniture bills, $8 for eyeglasses, $29 for a refrigerator as well as utility bills.

28. Third plaintiffs presently are seeking a loan to repair their roof which leaks rain.

29. In March, 1973, third plaintiffs suffered a reduction in their AFDC check from $89 to $86.

30. Prior to March, 1973, third plaintiffs had appealed twice to defendants' hearing officer the reduction of their AFDC grant to $89 because of the proration of rent and utilities. The hearing officer sustained defendants' policy on September 9, 1971, and August 22, 1972.

31. Because of the utilization of a single figure needs allowance at the established need level, plaintiffs, their families and other similarly situated suffered severely: some from reduction in their grants and others from total termination from all welfare benefits.

32. FSH 3130 and form 36 consolidate four items of need into a single figure needs allowance for Aid to Families with Dependent Children (AFDC) recipients. The provisions comprise the basic measure of poverty used by defendants to define eligibility and grant levels for its AFDC program.

33. Texas, as fifty-three other jurisdictions, cooperates with the federal government in providing financial assistance to dependent children through the AFDC program. In order to receive federal funds of about $98 million in fiscal 1971 to match with $27 million state dollars, the defendants write a state plan to

meet the provisions of the AFDC program (42 U.S.C. §601 et. seq.).

34. The relevant statutory provision for this cause of action is 42 U.S.C. §602(a) (23):

> A State plan for aid and services to needy families with children must (23) provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted.

35. The United States Department of Health, Education, and Welfare in implementing this statute has issued regulations governing consolidation of the composite parts of the standard of need (45 C.F.R. §233.20(a) (2) (ii)):

> In such adjustment a consolidation of the standard (i.e., combining of items) may not result in a reduction in the content of the standard. In the event the State is not able to meet need in full under the adjusted standard, the State may make ratable reductions in accordance with sub paragraph (3) (viii) of this paragraph.

36. 42 U.S.C. §602(a) (23) establishes a floor below which the standard of need cannot be reduced.

37. 42 U.S.C. §602(a) (23) also permits the defendants to consolidate the items of need only so long as the result includes all former items of need, fairly prices those items and finally fairly averages need.

38. The State of Texas has established that the purpose of the standard of need in the AFDC program is

to enable recipients to achieve and maintain a standard of reasonable subsistence compatible with decency and health. (TEX. REV. CIV. STAT. ANN. art. 695c, §17).

39. Prior to March 1, 1972, all AFDC families benefited from a standard of need that was the sum of four separate kinds of need with various allowances and some dollar maximums.

a. Personal need allowance

(1.) $65 for an adult recipient
(2.) $25 for a child under 18 years of age
(3.) $39 for a child 18-21 years of age

b. Rent or shelter allowance, a dollar maximum,
(1.) For private or owned housing, as paid up to,
(a.) 1-2 persons $33
(b.) 3-4 persons $44
(c.) 5 or more $50
(2.) For public or federally subsidized housing an allowance
(a.) 1 person $36
(b.) 2-4 persons $42
(c.) 5 or more $50

c. Utilities allowance for private housing only $13

d. Special needs
(1.) dentures $63 once per year
(2.) chronic chiropractic care $6 per month
(3.) chronic podiatrist care $6 per month
(4.) chronic dental care $6 per month
(5.) social care up to $247.50 per month
(6.) glasses $17 once per year
(7.) hearing aids $80 once per year

40. From the above schedule, the AFDC grant was calculated in three steps:

a. First, defendants totaled the individual items of need to obtain a standard of need for the family.

b. Second, defendants applied a percentage reduction factor of 75% to get recognizable needs.

c. Third, defendants subtracted any income actually available to the family from the recognizable needs to arrive at the grant figure.

41. However, the need stated for the shelter and utilities items was further reduced before March 1, 1973, by two policies: prorating when nonrecipients lived in the home and budgeting zero needs when these items were provided.

42. If a recipient of AFDC, OAA, AB or APTD lives with a nonrecipient who is not a spouse or an essential person, defendants budget only the prorata shelter and utility needs (FSH 3141.2, 3141.3 & 3420.4 (11/72)).

43. If a recipient lives with nondependent relatives who provide shelter and utilities, then the person is budgeted zero needs for each item (FSH 3141.2 & 3141.3 (11/72)).

44. After March 1, 1973, the standard of need will be determined soley (sic) from the chart for AFDC families with or without a caretaker:

AFDC Single Figure Needs Allowance Per Month

Family size	1	2	3	4	5	6	7	8	9	10	+
Non-caretaker	$32	$62	$90	$118	$146	$174	$202	$230	$258	$286	irregular
Caretaker	$ 0	$115	$155	$187	$218	$246	$273	$300	$326	$353	irregular

45. Defendants have averaged shelter costs to a figure as low as $17 per month for a caretaker family of two to no more than $40 per month for any family.

46. Defendants have also included in their average utility allowances budgeted at less than the full $13 allowance-- a budgeting practice which violates their own regulations (FSH 3141.2 (11/72)).

47. On its face these need figures represent a reduction in the standard of need below the floor established in September, 1969, for all noncaretaker and all caretaker families paying full rent in private housing with ten members or less and for those in public housing with three members or less. The reduction runs from 16% for caretaker families of two to less than 1% for families of nine. These figures are compared in attached tables.

48. The single figure needs allowance results in a termination from all welfare benefits of the first family of plaintiffs of Agnes Stafford:

Before March 1, 1973		**After March 1, 1973**	
Personal needs: $65 x 1 adult	= $ 65	Single figure	
$25 x 3 children	= 25	Needs Allowance	$115 x 75%
Shelter for 2 in public housing	= 42	Recognized Need	86
Utilities	= 0	Minus VA check =	$ 87
Special needs	= 0	No AFDC grant	0
Total needs	= 132 x 75%		
Recognized needs	= $ 99		
Minus VA check	= 87		
Actual AFDC grant	= 12		

49. The single figure needs allowance represents a lower standard of need and grant for the second family of plaintiffs Dorothy Marie Phoenix:

Before March 1, 1973		**After March 1, 1973**	
Personal Needs: $65 x 1 adult	= $ 65	Single Figure	
$25 x 3 children	= 75	Needs allowance =	$187 x 75%
Rent for 4 persons in private housing	= 44	Recognized needs	$140
Utilities	= 13	No other income	-0
Special Needs	= 0	Actual AFDC grant	$140
Total needs	$197 x 75%		
Recognized needs	$148		
No other income	-0		
Actual AFDC grant	$148		

50. The single figure needs allowance represents a lower standard of need and grant for the third family of plaintiffs Paula Ortega:

Before March 1, 1973		**After March 1, 1973**	
Personal needs: $65 x 1 adult	= $65.00	Single figure needs allowance for caretaker family of two	= $115 x 75%
$25 x 1 child	= 25.00	Recognized needs	= $ 86
½ of housing allowance for 4 persons in private housing ½ x $44.00	= 22.00	No other income	=-$ 0
½ of utility allowance ½ x $13.00	= 6.50	Actual AFDC grant	=$ 86
Special needs	= 0.00		
Total needs	$118.50 x 75%		
Recognized needs	88.88		
No other income	-0.00		
Actual AFDC grant	$ 89.00		

51. Defendants fail to state actual need by averaging arbitrary dollar maximums for shelter in private and owned housing.

52. Defendants' proration of shelter and utility needs bears no relation to actual need and works unfairly to reduce the average.

53. Defendants' proration of shelter and utility needs also constitutes an assumption of income in violation of 45 C.F.R. §233.20(a) (3) (ii).

54. Defendants' proration of shelter and utility needs finally violates the money payment principle of the

Social Security Act (42 U.S.C. §606(b); 45 C.F.R. §234.11(a), in that it penalizes recipients who choose to live with nonrecipients who are neither their spouse, nor their essential person.

55. Defendants obscure the actual need by averaging zero shelter and zero utility needs.

56. Defendants violate their own regulations and understate actual need by averaging less than full utility allowances.

57. Finally defendants have consistently underevaluated the consolidated needs of recipients and therefore have on the face of the figures reduced the standard of need below the 1969 level.

58. Furthermore the Department fails to meet the purpose of 42 U.S.C. §602(a) (23) which is to lay bare the extent to which the AFDC program falls short of fulfilling actual need.

59. Therefore, FSH 3130 and form 36 violate 42 U.S.C. §602(a) (23) as to plaintiffs and others similarly situated by stating a standard of need that fails to maintain a reasonable relationship to real needs in Texas.

***

Second count, para 61 & 62— This second count asking for declaratory and injunctive relief is brought because plaintiffs seek to enjoin the reduction of shelter and utility needs by the policy of proration of the Texas State Department of Public Welfare. Although some recipients of public assistance have full need for the maximum shelter and complete utility allowance because they choose to live with nondependents who are neither their spouse nor their essential person as defined

by defendants, they receive less than the full allowances. These lesser allowances have also been averaged in and therefore have reduced the new AFDC single figure needs allowances.

The policy of proration is unlawful for two reasons:

a. It constitutes an assumption of income in violation of an important principle of public assistance promulgated in the federal regulations.

b. It also violates the money payment principle of the Social Security Act by penalizing recipients who choose to live with nonrecipients.

***

Class action allegation, para 65-66—The named plaintiffs for the second count bring this action on behalf of their members as in case of the Houston Welfare Rights Organization, Inc., and on behalf of themselves as in the case of the families of plaintiffs, and pursuant to Rule 23(a) & (b) (2) of the Federal Rules of Civil Procedure on behalf of all other persons similarly situated.

The class for the second count contains all those persons who are, were or will be recipients of Aid to Families with Dependent Children (AFDC) whose shelter and utility needs are reduced by the policy of proration located at §3141.3 and §3420.4 of the Financial Services Handbook of the Texas State Department of Public Welfare (FSH 3141.2, 3141.3 & 3420.4). And the class also includes all those members of the class for the first count of this complaint whose checks will be reduced or whose eligibility will be terminated by the implementation of the single figure

needs allowance under FSH 3130 and form 36. As to the class for the second count, the requirements of Rule 23 are met in that the class is so numerous that the joinder of all members is impractical; there are questions of law and fact typical of the claims of the class; the representative parties will fairly and adequately protect the interests of the class; and the defendants have acted on grounds generally applicable to the class, thereby making appropriate final injunctive and declaratory relief with respect to the class as a whole.
***

Article III

MOTION FOR SUMMARY JUDGMENT

Defendants' Motion for Summary Judgment, full para.— COMES NOW John L. Hill, Attorney General of the State of Texas, by and on behalf of Defendants in the above entitled and numbered cause of action, and respectfully moves this Court pursuant to the provisions of Rules 56 (b) and (c) of the Federal Rules of Civil Procedure, for an order granting summary judgment for the Defendants, on the ground that the pleadings and affidavits hereto attached, depositions and interrogatories, and memorandum of law in support of this motion, show that there is no genuine issue of material fact and the Defendants are entitled to judgment as a matter of law.

Article IV

FINAL JUDGMENT

Pursuant to the Memorandum and Opinion of this Court issued on February 11, 1975, and the Court having determined from the pleadings, depositions and record herein that there is no genuine issue as to any material fact in this Cause and that the Defendants are entitled to Judgment as a matter of law,

It is hereby ORDERED, ADJUDGED and DECREED that all relief sought by the Plaintiffs herein is denied, that Summary Judgment is hereby granted in all respects for the Defendants, and that costs be taxed against the Plaintiffs herein.

Done this 15th day of April, 1975, at Houston, Harris County, Texas.

Article V

MOTION TO REOPEN COURT'S MEMORANDUM AND OPINION FOR LEAVE TO AMEND PETITION TO STATE A NEW CAUSE OF ACTION AND FOR A THREE-JUDGE COURT

Plaintiffs make this motion to reopen the memorandum and opinion of the court for leave to amend their petition to state a new cause of action and for a three-judge court under the implied power of Rules 52(b) and 15 of the Federal Rules of Civil Procedure. In support they state the following:

1. A motion to reopen is entitled to more consideration that (sic) a motion to modify judgment or for new trial because of its timeliness.

2. In its opinion, the court was unable to reach the constitutional grounds because they were not plead, although they were briefed (Memo at 14).

3. Plaintiffs have filed a class action composed of over one half of all the recipients of Aid to Families with Dependent Children in Texas (AFDC).

4. Plaintiffs argue that it would be in the interest of a just, speedy, and inexpensive determination of every action to grant leave to amend the petition or for

supplemental pleadings under Rule 1 of the Federal Rules of Civil Procedure.

5. The plaintiffs further argue that the addition of the constitutional issues to this action would allow determination by a three-judge court without further proceedings before the instant tribunal which would have been substantially the approach required at (sic) the issues been alleged before the entry of the pretrial order and the termination of amendments.

PREMISES CONSIDERED, plaintiffs pray for leave to amend or file supplemental pleadings to state constitutional causes of action and for other appropriate relief.

MOTION TO MODIFY JUDGMENT FOR INSUFFICIENCY OF EVIDENCE AND FOR LEAVE TO AMEND PETITION TO STATE NEW CAUSES OF ACTION

Plaintiffs make this motion to modify judgment for insufficiency of evidence pursuant to Rules 59(e) and 52(b) of the Federal Rules of Civil Procedure. They also make this motion to modify judgment for leave to amend petition to state new causes of action under Rules 15 and 52(b). In support, they reiterate all the facts, claims, affidavits and arguments stated to support motions to reopen the court's memorandum and opinion which were filed on April 10, 1975.

PREMISES CONSIDERED, plaintiffs pray for revision of the court's memorandum and opinion and for leave to amend petition and file supplemental pleadings and for full relief as prayed for in the amended petition on file and motion for summary judgment of plaintiffs.

Article VI

ORDER

Plaintiffs' Motion to Reopen Court's Memorandum and Opinion for Insufficiency of Evidence is denied.

Plaintiffs' Motion to Reopen Court's Memorandum and Opinion for Leave to Amend Petition to State New Cause of Action and for Three-Judge Court is denied. The demands of this Court's docket do not permit it to allow a party who has had its day in court to restructure and replead its case merely because it has obtained an adverse decision.

DONE at Houston, Texas, this 9th day of May, 1975.

Article VII

ROUSE DEPOSITION

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

HOUSTON WELFARE RIGHTS ORGANIZATION, INC., AGNES STAFFORD, INDIVIDUALLY AND ON BEHALF OF HER GRANDSON; DOROTHY MARIE PHOENIX, INDIVIDUALLY AND ON BEHALF OF HER THREE MINOR CHILDREN; AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

vs.

CA 73-H-296
COMPLAINT CLASS ACTION

RAYMOND W. VOWELL, COMMISSIONER OF THE TEXAS STATE DEPARTMENT OF PUBLIC WELFARE, ET AL

DEPOSITION OF LESTER CHARLES ROUSE, JR. taken on the 24th day of April, A.D., 1973, beginning at 9:00 A. M., in the offices of the Legal Service Division,

State Department of Public Welfare, Reagan Building, Austin, Texas, before Bette Jo Mitchell, a Notary Public in and for Travis County, Texas, pursuant to the following stipulation and waiver of counsel.

A P P E A R A N C E S :

FOR THE PLAINTIFFS:

MR. JEFFREY J. SKARDA, Houston Legal Foundation, 2912 Luell Street, Houston, Texas 77016.

FOR THE DEFENDANTS:

MRS. CAROLYN BUSCH, Legal Services Division, State Department of Public Welfare, Reagan Building, Austin, Texas; MR. LEE EDWARD HARTMAN, JR., Staff Attorney, State Department of Public Welfare, Reagan Building, Austin, Texas;

MRS. PENNY J. BROWN, Assistant Attorney General of Texas, Supreme Court Building, Austin, Texas.

****

STIPULATION

It is stipulated and agreed by and between counsel for the respective parties hereto that the deposition of the witness, LESTER CHARLES ROUSE, JR., may be taken at this time and place before Bette Jo Mitchell, a Notary Public in and for Travis County, Texas; time and notice being waived; and that the said deposition, or any part thereof, when so taken, may be used on the trial of this case with the same force and effect as if the witness were present in court and testifying in person.

It is further stipulated and agreed by and between counsel for the respective parties hereto that the

necessity for preserving objections at the time of taking is waived, and that any and all legal objections to this deposition, or any part thereof, may be urged at the time same is sought to be offered in evidence on the trial of this cause.

. . .

Q (By Mr. Skarda) With respect to the financial services programs that you administer, these are categorical assistance programs, aren't they, that match federal dollars with state dollars to provide assistance to the blind, disabled, families with dependent children, and old age?

A Yes.

Q And, then working within these programs you are obliged to comply with certain federal regulations.

A That is correct.

Q Before March 1st, 1973, what manner did the Texas State Department of Public Welfare use for determining a grant for an A. F. D. C. family?

A We had certain chart figures here, that is quite detailed on a form. How much do you want? Do you want an exhibit or --

Q Could you just state the various items of need and the method of averaging those items?

A Well, A. F. D. C., we had one item that is known as personal needs, which is a composite figure that represents food, and clothing and incidentals. Now, years ago we itemized those separately, but we combined them into one item and that was called personal needs. That is the same for everyone that is a recipient -- Well, it varies, according to whether the person is a recipient or a dependent or a child, and I think it would be easier to refer to the chart, because it's rather complex.

Q Do you have a chart here that we can enter into the record?

A Yes. Now, this is item 5 here, and then I have another item 6 here, is what the allowances are today.

. . .

MRS. BUSCH: This is chart allowance, the chart of allowances prior to the conversion to the new method. Mark that Defendants' Exhibit A.

(An instrument was marked Defendants' Exhibit A for identification)

Q (By Mr. Skarda) Under Plan 13, this reflects a number of different items of need, personal need, housing, utilities, special allowances, and these represent essentially those items paid for by the department before March 1st, 1973.

A That's correct.

Q Now, tell me, would a caseworker take each one of these that is applicable to the particular family and add up the items of need, and, then what happens, after you get a total standard of need for the family?

A Well, the first thing that is applied to the total

State of Texas
Department of Public Welfare

Form 36
Effective Oct., 1972

STANDARD BUDGETARY ALLOWANCES

The amounts listed below are the chart allowances for budgeted items and grant maximums for each category (except AFDC, which has no maximum). The total needs of all eligible recipients must be budgeted. Recommended grants, however, cannot exceed the maximum grant for adult categories as determined on the basis of the amount of funds available to each category. The amount of total needs in a budget may be greater than the recommended grant due to the maximum grant limitation.

MAXIMUM GRANTS	
OAA	$133.00
AB	$133.00
APTD	$133.00
OAA and AB, age 65 or over, in Foster Care Homes	$179.00

Percentage of Budgetable Needs Recognized for Each Category	
OAA	100%
AB	100%
APTD	100%
AFDC	75%

BASE PLANS

02 . . . . No Budget (Social Services only and AFDC Foster Care)
06 . . . . Room and Board, Retirement Home, Cafe Meals
09 . . . . Foster Care for the Aged-Non-Vendor
10 (ICF II), 11 (ICF III), 12 (Skilled Nursing Home) . . . Vendor Nursing Care
13 . . . All Medical and Public Assistance Budgets in Which No Other Plan is Applicable
14 . . . Institutional - Mental Hospital
15 . . . Extended Care Facility
16 . . . Institutional - State School for the Mentally Retarded
17 . . . Institutional - Tuberculosis Hospital

BUDGETARY ALLOWANCES

PLAN 6

Adult Recipient	$133.00
Adult Essential Person	$129.00

Entered in Personal Needs for cases in retirement home, room and board arrangements and cafe meals arrangements. ($100 of this allowance represents the maximum budgetable rate for room and board.)

PLAN 9

Personal Needs Allowance	$ 25.00
Social Care Allowance	$135.00

PLANS 10, 11, 12 and 15

OAA, AB and APTD adult recipient Personal Needs	$25.00

See Schedule of Rates for Vendor Maximum Amounts

PLANS 14, 16 and 17

OAA, AB and APTD adult recipient Personal Needs	$12.00
AFDC child in State School for the Mentally Retarded	$ 8.00

AFDC FOSTER CARE

Base Plan 02, Type of Program 08
DAILY RATES:
- $2.20 for child requiring normal care in a DFW or other licensed child-placing agency approved Foster Home
- $3.00 for child requiring exceptional care in a DFW or other licensed child-placing agency approved Foster Home only
- $1.60 for child requiring normal care in an approved child-caring institution
- $2.20 for child requiring exceptional care in an approved child-caring institution

PLAN 13

Personal Needs

OAA, AB and APTD adult recipient	$77.00
AFDC adult recipient	$65.00
Adult non-recipient, adult essential person, Child 18-21 (except APTD/AB Recipient)	$39.00
Child (under 18)	$25.00

HOUSING

Rented Quarters - Public, Including Utilities	
1 person	$36.00
2-4 persons	$42.00
5 or more persons	$49.00
Rented Quarters - Private (as paid up to)	
1-2 persons	$33.00
3-4 persons	$44.00
5 or more persons	$50.00
Owned Quarters - Private (as paid up to)	
1-2 persons	$33.00
3-4 persons	$44.00
5 or more persons	$50.00

UTILITIES

Allowance per family	$13.00

SPECIAL ALLOWANCES

Glasses (Code 121)	$17.00
Dentures (Code 122)	$63.00
Hearing Aid (Code 123)	$80.00

PMH 547

and regulations to agree with -- Well, H.E.W.'s rules and regulations just wouldn't match with HUD's rules and regulations, and we were always -- every time we would raise a grant, that would do something to their income, and then they had an income schedule and they would have to raise their grant, or raise their rent, and then we would have to go back and raise ours. It was a vicious cycle.

MR. SKARDA: Now, I would like to introduce an exhibit, Plaintiffs' Exhibit A.

(An instrument was marked Plaintiffs' Exhibit A for identification)

Q (By Mr. Skarda) On page 4 of Plaintiffs' Exhibit A we have what I understand to be the averages for caretaker families.

MRS. BUSCH: Let's identify this document a minute.

A Okay.

MRS. BUSCH: Mr. Skarda, these are the figures that I gave you in Houston that represent the averages that were presented to the Board of Public Welfare.

Q (By Mr. Skarda) Now, if you would look at this a minute, Mr. Rouse, under the housing figure, the average there was thirty-three dollars point eight three eight, that represents that amount average for shelter across the board over these four month periods.

A Across the board, including the public housing, the private housing, and taxes and anything going into shelter. Now, that was taken from amounts actually budgeted at the time, see.

Q This thirty-three dollar figure does represent approximately eleven dollars, ten to eleven dollars less than the forty-four dollar maximum for rent in private housing.

A But we never had a flat figure that everybody got forty-four dollars. We never had that.

Q And, because of that --

A As a matter of fact, they didn't get the forty-four dollars.

Q Because of the dollar maximum, because of the proration policy, because of --

A Because --

Q -- because they might be budgeted for zero amount.

A Because they were not spending it. There was not a need. It would be a fictitious need, as you described it.

Q All the reasons we talked about earlier is the reason why this averaged out less than the forty-four dollar maximum.

A Yes.

Q Let's talk about the utility allowances for one moment. The utility allowance was thirteen dollars. It wasn't a maximum, was it, it was a chart figure?

A No, it was a chart figure.

Q Now, that was also averaged on this same Plaintiffs' Exhibit A down to a nine dollar figure.

A Yes.

Q Tell me if these were the reasons that it was averaged down to a nine dollar figure, the family might have been living with another person, therefore the utility allowance would have been prorated, is that correct?

A That's correct.

Q Exactly as it was for shelter.

A Yes.

Q Or the family could not -- might have been living in public housing and therefore had no utility allowance.

A Well, they had a utility allowance because the housing figure was a composite figure, but it was a lower amount. In other words, if you take the aggregate of what you get in private housing and compare it with what you get in public housing, it's true you get less in public housing.

Q But you didn't need as much in public housing.

A That's right, because they weren't charging as much.

. . .

CROSS EXAMINATION:

BY MRS. BUSCH:

Q Mr. Rouse, in order to aid the Court in understanding our budgeting procedures, I would like for you, if you would, to begin with, to go through and describe the previous budgeting methods that we were using prior to March 1st, 1973, and then in a moment I want to go back a little bit further and go back to some of the previous methods that were used. But for purposes of understanding the department's procedures which at times may appear somewhat complex, simply describe how a field worker under the prior method would build a budget and include the needs and determine the amount of the grant.

A Well, I would say, Mrs. Busch, that we have been striving toward simplification of our budgeting system. Now, as Mr. Skarda implied previously, we were doing this for the department's convenience, I would say that is a part of the reason for simplification, but on the other hand we were doing this likewise for the clients' convenience, for the clients to be able to understand what their needs were. As you know, the client has a right to know just exactly what goes into determining his grant, and so simplification actually works toward a fairer treatment of clients. Because if you have a complex system there that some of these people that haven't had the benefit of much education can't understand - I will go further than that, I will say that there are a lot of college people that can't understand our budgeting procedure, the one we had. It's kind of like Topay, it just kind of grew.

Q Well, I would like to get into some more things on simplification.

A Yes, okay.

Q But, right now, why don't you just tell us, if you were a field worker in February, how you would have built a budget under the previous method.

A Well, we have here -- Well, this is a little difficult without you telling me what kind of a family. It would depend upon what size family, how many different factors could enter into it --

Q Let's take the same hypothetical we have been using of a mother and three children, and, for example, the things that would need to be varified, such as rent and utilities and any special needs that this family might have. Just describe the amount of budgeting detail that a worker had to go through under the prior system.

A All right. So, you have given me the size of the family, and so then I will have to ask you, are you talking about the children being under eighteen or over eighteen?

Q Under eighteen.

A Under eighteen. Are you speaking of a family that lives in public housing or in private housing? That is a factor the worker would have to determine.

Q No, I am speaking of a family that is living in private housing, in a home that they own, that was purchased by the mother and a deceased father before his death, and she owns the home.

A All right. Then, we would allow the mother a chart figure of sixty-five dollars, which is comparatively easy; the children under eighteen, twenty-five dollars each, and then you come to this item of shelter, she owns the home. Well, you would have to verify the amount of taxes owed on that home, either

from receipts in her possession or by going down to the courthouse to verify it from records. You would have to determine if she is paying insurance on the home, and you would determine whether she had any little shelter repair payment on the home. Well, you add all of these things together to get what her shelter allowance would be, what the actual amount would be. That was, of course, quite time consuming for both the worker and the client, to get together all of this information. And, then the item of utilities would be the chart figure of thirteen dollars. And, then you would determine what her income was and see how much of that --

Q Well, now, first, is it correct that you would total up all of those needs?

A Yes, you would total all of those needs.

Q And, then what would you do?

A Then what you do at that point, you apply this proration factor which recognizes seventy-five per cent of the needs, and would arrive at what we refer to as recognized needs. And, then when you come to her income, why, you have to go through various processes there of exempting certain income before you get down to the income that is charged against her, but that part of it hasn't changed and I see no point in --

Q Now, one other point of clarification. Now, if one child in this family had a need for glasses, or if another child in this family had a need for a hearing aid, what would the worker do in that instance?

A Well, the worker would have to determine that the need existed, and would have to determine that the woman had a plan for buying the glasses or whatever, and then they would budget it.

Q Now, all of these procedures that you have been describing are under the budgeting procedure that was in existence prior to March 1, 1973.

A That is true.

Q Would you describe it as a somewhat complicated procedure, and was subject to building a custom made budget for each family, which was built by the worker?

A Yes. In fact, we referred to it as a tailor made budget, an individualized budget.

Q All right. Now, Mr. Rouse, would you describe the method of determining the amount of grant under the new, what we refer to as the flat grant method, which has been in effect since March 1, 1973.

A Well, all that is necessary for the worker to determine is how many people there are in the family. You don't have to know what the taxes are, or whether they even pay any taxes or not, and -- Well, it's just that simple. If there is four people in the family, you look at a chart figure and that is what it is.

Q And, this chart figure has also had the rateable reduction applied to it so that the worker just has to look at one figure, and that is the amount of need, and from that you deduct non-exempted income.

A That's correct.

Q Okay. Mr. Rouse, in your opinion, is the new method a fairer method of administering available funds?

A It is very definitely a fairer method, because it eliminates areas of discretion, or areas of subjective judgment that a worker might exercise, and lets the client know exactly what he is entitled to, and so he can

understand it. A lot of times the clients were at a disadvantage, like in the appeal here, and they just knew vaguely they weren't getting enough money and they didn't know how to argue the case, because it was so complex.

Q Okay. Would you say that the new method is more uniform in statewide application than the prior method?

A Oh, yes. Oh, yes, it's more uniform.

Q All right. I would like to go back to some of the earlier discussion with regard to the cost of living increase which was required under Section 402-A-23 of the Social Security Act. You earlier testified that the department had made a cost of living adjustment which was required by July 1, 1969, and is it your testimony that the department did increase the standard of need at that time by eleven per cent?

A That is correct, with the exception of this little minor thing that I have already --

Q Which was later corrected.

A Yes, yes.

Q Was the action that was taken with regard to the cost of living increase provision in 1969, was it in compliance with Federal Regulations at that time?

A It was. We worked it out with the H. E. W. people. We spent many hours working on it.

. . .

Q Was the action that the department took with regard

A -- but it was approximately eleven per cent.

Q With regard to the proration, or the policy of budgeting the prorata share of utilities or housing allowance when you had non-dependent relatives sharing housing, is it correct that this policy was based on the principal that the department was not required to meet the needs of any persons other than those who were eligible for welfare assistance?

A It was based upon that principal.

Q Is it also correct that under the statutory responsibilities of the department, that the department is not required to meet the housing or utility needs of persons who are not eligible for welfare?

A That's correct, nor the food needs, or any other needs.

Q With regard to the allusion Mr. Skarda made to the Senate Interim Committee Report, is it correct that the department has never stated that its allowances are adequate to meet actual costs?

A That is correct, we have never made that statement that I know of.

. . .

State of Texas
Department of Public Welfare

Form 38
6H, 2-1-73

STANDARD BUDGETARY ALLOWANCES

The amounts listed below are the chart allowances for budgeted items and grant maximums for each category. The total needs of all eligible recipients must be budgeted. Recommended grants, however, cannot exceed the maximum grant as determined on the basis of the amount of funds available to each category. The amount of total needs in a budget may be greater than the recommended grant due to the maximum grant limitation.

	BASE PLANS
02	No Budget (Social Services only and AFDC Foster Care)
06	Room and Board, Retirement Home, Cafe Meals
08	Foster Care for Adults - Non-Vendor
10	ICF II - Vendor Nursing Care
11	ICF III - Vendor Nursing Care
12	Skilled Nursing Home - Vendor Nursing Care
13	All Medical and Public Assistance Budgets for which no other plan is applicable
14	Institutional - Mental Hospital
15	Extended Care Facility
16	Institutional - State School for the Mentally Retarded
17	Institutional - Chest Hospital

PERCENTAGE OF BUDGETABLE NEEDS	
OAA, AB, APTD	100%
AFDC	75%

MAXIMUM GRANTS	
OAA, AB, APTD	$137.00
OAA & AB age 65 or over Adult Foster Homes	179.00
AFDC	300.00

BASE PLAN 13 - OAA, AB, APTD

Personal Needs	
OAA, AB, APTD Adult Recipient	$77.00
Adult Essential Person	$39.00
Housing	
Public Rented Quarters (Including Utilities)	
1 person	$38.00
2-4 persons	$42.00
5 or more persons	$49.00
Private Rented Quarters, as paid up to	
1-2 persons	$33.00
3-4 persons	$64.00
5 or more persons	$80.00
Private Owned Quarters, as paid up to	
1-2 persons	$33.00
3-4 persons	$44.00
5 or more persons	$80.00
Utilities	
Allowance Per Family	$13.00
Social Care	
Maximum per person to non-relative	$240.00
Maximum per person to relative	$ 50.00

BASE PLAN 13 - AFDC SINGLE FIGURE NEEDS ALLOWANCE

Non-Caretaker Cases			Caretaker Cases		
Fam. Size	Budgetary Needs (100%)	Recog. Needs (75%)	Fam. Size	Budgetary Needs (100%)	Recog. Needs (75%)
1	$ 32.00	$ 24.00	2	$115.00	$ 86.25
2	62.00	46.50	3	155.00	116.25
3	90.00	67.50	4	187.00	140.25
4	118.00	88.50	5	218.00	163.50
5	146.00	109.50	6	246.00	184.50
6	174.00	130.50	7	273.00	204.75
7	202.00	151.50	8	300.00	225.00
8	230.00	172.50	9	326.00	244.50
9	258.00	193.50	10	353.00	264.75
10	286.00	214.50	11	380.00	285.00
11	314.00	235.50	12	412.00	309.00
12	342.00	256.50	13	439.00	329.25
13	370.00	277.50	14	468.00	351.75
14	398.00	298.50	15	497.00	372.75
15 or over	$ 28.00 for each additional member		16	534.00	400.50
			17 or over	$ 33.00 for each additional member	

SPECIAL ALLOWANCES

Code 121	Glasses (All Categories)	$17.00
Code 122	Dentures (OAA, AB, APTD)	63.00
Code 123	Hearing Aids (All Categories)	80.00

4-Member Caretaker Family

(Universe--68,246 Cases)

		Average
Personal Needs	$9,797,200.00	$143.557
Housing	2,309,299.99	33.838
Utilities	635,617.97	9.314
Glasses	7,429.00	.109
Dentures	869.00	.013
Hearing Aids	55.00	.001
Professional Care	1,003.67	.014
Social Care	1,423.32	.021
	TOTAL AVERAGE	$186.867

Caretaker Cases

Averages of 4 Months

Family Size	4-Month Total # of Cases	4-Month Total Requirements	Average Requirements
2	115,686	$13,256,411.47	$114.59
3	93,023	14,462,096.75	155.47
4	68,246	12,752,897.95	186.87
5	49,272	10,763,386.26	218.45
6	32,969	8,106,795.39	245.89
7	20,393	5,573,260.60	273.29
8	11,694	3,503,617.67	299.61
9	6,685	2,177,045.05	325.66
10	3,469	1,225,449.03	353.26
11	1,749	665,357.30	380.42
12	704	290,385.10	412.48
13	340	149,360.92	439.30
14	114	53,429.03	468.68
15	27	29,361.78	497.26
16	12	6,405.16	533.76

Article VIII

PLAINTIFFS' FIRST INTERROGATORIES and DEFENDANTS' ANSWERS

Plaintiffs' First Interrogatories, no. 4(a&c)— For the standards in effect prior to March 1, 1973, state the largest standard of need budgeted and the largest amount paid for basic needs including shelter but excluding special needs for each AFDC family size where the children are all under eighteen (18) years of age and have the following characteristics: (a) Caretaker families in private housing; (c) Noncaretaker families in private housing.

Defendants' Answers, no. 4(a&c)— For standards in effect prior to March 1, 1973, the largest standard of need budgeted and the largest amount paid for basic needs, including shelter but excluding special needs, for each family size where children are all under age 18 years and have the following characteristics were: a. Caretaker families in private housing.

FAMILY SIZE	MAXIMUM STANDARD OF NEED	MAXIMUM PAID
2	$136	$102
3	172	129
4	197	148
5	228	171
6	253	190
7	278	209
8	303	227
9	328	246
10	353	265
11	378	284
12	403	302
13	428	321
14	453	340
15	478	359
16	503	377

c. Noncaretaker families in private housing.

FAMILY SIZE	MAXIMUM STANDARD OF NEED	MAXIMUM PAID
1	$ 48	$ 36
2	88	66
3	118	89
4	150	113
5	178	134
6	204	153
7	230	173
8	256	192
9	282	212
10	307	230
11	333	250
12	358	269
13	383	287
14	409	307
15	434	326

No. 14(d) text of FSH 3122.3, para. 4-6 (9/70)— When the applicant or recipient lives with non-dependent relatives in their shelter, his prorata share(s) of the shelter expense within the group maximum shall be budgeted provided the non-dependent relative does not meet all this expense for him. This means that the applicant and/or recipient must actually be participating in meeting shelter expense before his prorata share(s) can be budgeted.

When non-dependent relatives live with the applicant in his shelter, the applicant's prorata share(s) of the shelter expenses within the group maximum shall be an allowable expense, providing the non-dependent relatives do not meet this expense for him.

Regardless of the economic situation of the non-dependent relative in either of the above situations, both shelter and utilities will be budgeted only in the amount of the prorata share for the applicant and his dependents.

No. 14(d) text of FSH 3122, para. 5 (3/69)— When a recipient shares living arrangements with non-dependent relatives, his budget will carry his prorata share and that of his dependents of the utility chart figure, provided the non-dependent relative does not meet this expense for him.

Plaintiffs' First Interrogatories No. 19—State whether the method of converting to a single figure needs allowance bears any relationship to actual need for rent or shelter. And if so describe that relationship.

Defendants' Answer to No. 19— The State Department of Public Welfare does not hold that the shelter and utilities budgetary allowances which were in effect during the period November, 1971, through August, 1972, were adequate to meet those needs on an actuality basis because of insufficient funds available for payment of the actual cost of subsistence needs.

Article IX

PLAINTIFFS' MEMORANDUM IN SUPPORT of MOTION FOR SUMMARY JUDGMENT

Exhibits —

TABLE ONE AFDC CHANGES FOR CARETAKER FAMILIES IN PRIVATE HOUSING

Size of family	March, 19[illegible]				January or February, 19[illegible]	
	Grant 75%	Need 100%	Cut	%	Grant 75%	Need 100%
2	$ 86	115	$16	16%	$102	$136
3	116	155	13	10%	129	172
4	140	187	8	5.4%	148	197
5	164	218	7	4.1%	171	228
6	185	246	5	2.6%	190	253
7	205	273	4	1.9%	209	278
8	225	300	2	.88%	227	303
9	245	326	1	.45%	246	328
10	265	353	0	0%	265	353
+	Irreg.	Irreg.	+	+	+19	+25

TABLE TWO AFDC CHANGES FOR CARETAKER FAMILIES IN PUBLIC OR FEDERALIZED HOUSING

Size of family	January or February			
	Cut	%	Grant (75%)	Need (100%)
2	$13	13%	$ 99	$132
3	2	1.9%	118	167
4	+3	+2.2%	137	192
5	+4	+2.5%	160	211
6	+6	+3.3%	179	230
7	+7	+3.5%	198	255
8	+8	+3.7%	217	280
9	+10	+4.3%	235	305
10	+11	+4.3%	254	330
+	Irreg.	Irreg.	+19	+25

TABLE THREE: AFDC
CHANGES FOR NON-CARETAKER[4]
FAMILIES IN PRIVATE[2] HOUSING

Size of family	January or February			March		
	Grant (75%)	%	Need[5] (100%)	Need (100%)	Cut	
1	$ 53	55%	$ 71	$ 32	$29	
2	72	35%	96	62	25	
3	99	31%	132	90	31	
4	118	16%	157	118	19	
5	141	22%	188	146	31	
6	160	18%	213	174	29	
7	179	15%	238	202	27	
8	197	12%	263	230	24	
9	216	10%	288	258	22	
+	+19	irreg.	+25	irreg.	irreg.	
				Grant (75%)		
1				$ 24		
2				47		
3				68		
4				89		
5				110		
6				131		
7				152		
8				173		
9				194		
+				irreg.		

TABLE FOUR: AFDC CHANGES FOR
NON-CARETAKER[4] FAMILIES IN PUBLIC[3]
OR FEDERALIZED[3] HOUSING

Size of family	January or February			
	Cut	%	Grant (75%)	Need[5] (100%)
1	$22	48%	$ 46	$ 61
2	22	32%	69	92
3	20	23%	88	117
4	7	6.6%	106	142
5	21	16%	131	174
6	28	19%	152	199
7	16	9.5%	168	224
8	14	7.5%	187	249
9	12	5.8%	206	274
+	irreg.	irreg.	+19	+25

FOOTNOTES TO TABLES

1. Caretaker families before the cuts are presumed to have only one adult, all children under 18 years of age and no special needs.

2. Private housing families before the cuts are presumed to received the maximum shelter and the full utility allowance.

3. Families in public or federalized housing before the cuts are presumed to receive the full housing allowance.

4. Non-caretaker families are usually without an adult eligible to receive a grant or already receiving a grant such as children of an APTD recipient or children in the home of non-needy relatives.

5. For non-caretaker families need has been presumed to include full utility and shelter allowances for the size of the recipient family and the same presumptions as to other factors are made: All children under 18 years of age and no special needs.

March 8, 1973

Mr. Raymond W. Vowell, Commissioner
Department of Public Welfare
John H. Reagan Building
Austin, Texas 78701

Dear Mr. Vowell:

You will recall that the draft guide to Redefinition and Consolidation of Assistance Payments (4th draft) dated August 15, 1972, had a typographical error on page 9 under Item h. In the subject draft, the second sentence reads as follows:

The study should include all situations as they are found. For example, if a State agency is redefining shelter from "actual - cost - to-a-maximum" to flat amounts for shelter for family size, the study should, to hold the balance even, not include those cases where the shelter amounts were subsidized, were in fact zero, or were prorated.

This error was discovered before I worked with your staff in using the guide and a pen and ink correction was made in our working copy.

I am enclosing for your information the July 25, 1972, guide form which the August 15 guide was copied in part. The paragraph in question appears on page 8 of this guide and you will note that the sentence in question correctly reads:

For example, if a State agency is redefining shelter from "actual - cost - to - a - maximum" to flat amounts for shelter for family size, the study should, to hold the balance even, *not exclude* those cases where the shelter amounts were subsidized, were in fact zero, or were prorated.

I am also sending you a copy of a later draft dated September 20, 1972 which further elaborates on this point. See page 10, item g.

Sincerely yours,

Dudley S. Hall
Associate Regional
Commissioner
Assistance Payments

4th DRAFT
August 15, 1972

A GUIDE TO REDEFINITION AND CONSOLIDATION

PART ONE

A. *Legal Background and Authority*

1. According to Section 402(a)(23) of the Social Security Act, "A State Plan must provide that by July 1, 1969, the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted."

2. The *Code of Federal Regulations* (45 CFR 233.20(a)) requires that: (1) A State Plan must provide that the determination of need and the amount of assistance for all applicants and recipients will be made on an objective and equitable basis and all types of income will be taken into consideration in the same way except where

otherwise specifically authorized by Federal Statute.

(2)(i) A State Plan must specify a State-wide standard, expressed in money amounts, to be used in determining (a) the need of applicants and recipients and (b) the amount of the assistance payment.

(ii) The State Plan must, in the AFDC plan, provide that by July 1, 1969, the State's standard of assistance for the AFDC program will have been adjusted to reflect fully changes in living costs since such standards were established, and any maximums that the State imposes on the amount of aid paid to families will have been proportionately adjusted. In such adjustment a consolidation of the standard (i.e., combining of items) may not result in a reduction in the content of the Standard.

. . .

g. Making an impartial study of actual agency practice in determining need and the amount of the assistance payment, for the items and factors to be considered.

h. Recording the actual amounts included in the budget for such items. The study should include all situations as they are found. For example, if a State agency is redefining shelter from "actual-cost-to-a-maximum" to flat amounts for shelter by family size, the study should, to hold the balance even, include all those cases where the shelter amounts were subsidized, were in fact zero, or were prorated. Including one or more of such variables as they occur in the valid study could either decrease the amounts or have no demonstrable effect, depending upon the frequency of occurrence of such

situations in the study and the caseload. If the State agency has fair averaged zero and/or prorated shelter amounts, a flat standard for shelter or flat grant, the State agency cannot introduce any policy which would duplicate this accountability.

This does not preclude a State agency from *excluding* from its study all cases where shelter was subsidized, zero, or prorated. If the decision is to exclude such situations, the State has not reduced the content of the standard. Excluding such variables, depending upon the frequency of their occurrence, could increase the appropriate amounts for shelter.

i. Whatever is done in the fair averaging process must continue and the standard cannot be reduced by State policy implementing the fair averaged amounts.

BEFORE ME, the undersigned Notary Public, on this day personally appeared TOM FORRESTER LORD, after being by me duly sworn, upon oath deposes and says:

THAT, he is the President of the Houston Housing Management Corporation and Executive Director of the Houston Housing Development Corporation and has from ten years' experience gained intimate knowledge of housing construction, management, and housing needs of low and moderate income families.

THAT, the median monthly rent for families residing in housing built under the Section 221 (d)(3) program for low-income persons is $158. Since the U.S. Department of Housing and Urban Development will not subsidize more than 70% of the market rent in 221 (d)(3) projects, the minimum rent charged in Houston, Texas would average $47.

THAT, the median monthly rent for families residing in housing built under the Section 236 program for moderate income families is *$146.* This figure is what the tenant pays, and reflects the benefit of the Federal subsidy, which is in the form of an interest reduction on the mortgage.

THAT, the median rent for all apartment units in Harris County on July 20, 1973 was *$176.* The median rent for a one bedroom apartment was $144, for a two bedroom apartment $188, and for a three bedroom apartment $246.

THAT, housing for the poor, specifically housing built under the Section 221 (d)(3) program has full occupancy, e.g., on July 20, 1973 95% of all units were occupied. Conventional apartments had an 82% occupancy. Apartments built under Section 236 were 88% occupied.

THAT, according to the 1970 Census of Population and Housing, the median rent in the City of Houston was $96.

THAT, the attached charts taken from *Houston-Galveston Area Apartment Survey,* July, 1973, are the source for the above statistical information.

FURTHER AFFIANT SAYETH NOT

EXECUTED this *23rd* day of *October,* 19 *73.*

/s/ TOM FORRESTER LORD

SUBSCRIBED AND SWORN TO before me this *23rd* day of *October,* 19 *73.*

/s/ NINA H. PARROTT
Notary Public in and for
Harris County, Texas

STATE DEPARTMENT OF PUBLIC WELFARE

P.O. Box 391
Harlingen, Tx 78550
September 10, 1971

Mrs. Paula Ortega
Rt. 2, Box 160-A
San Benito, Tx 78586

RE: SUSTAINED APPEAL

Dear Mrs. Ortega:

The enclosed Form 21 is your official record of the recently held appeal hearing. In it the decision to lower your grant of assistance is being SUSTAINED.

As was explained to you at the appeal hearing, due to the fact that your mother and sister are now living in the home with you, the allowances for shelter and utilities are being pro rated. The effect of this is the reason for the lowering of your grant of assistance.

Very truly yours,

STATE DEPARTMENT OF
PUBLIC WELFARE

/s/
Israel P. Garza
Hearing Officer

IPG:irg

Attachments

8. Hearing Officer's Decision and Explanation

The point of issue is whether this AFDC grant should be lowered due to a pro ration of the shelter and utilities allowance.

The appellant stated at the appeal hearing that she had no other choice but to have her mother and sister live in the home since they did not have any other place to go. It was explained to the appellant that under these circumstances, the allowance for utilities and shelter would have to be pro rated. It meant that the amount for these items would have to be divided by the number of persons in the home. In her case there were four persons in the home at this time.

The budgeting procedures were explained to the appellant. Since the appellant is paying $51.33 for shelter and the maximum for shelter is $44 for four persons, the result is $11 per person when divided. Therefore, the appellant and her son get a share of $22 for shelter. For utilities, the $13 divided by four indicates a pro rated share of $3.25 for each person; giving the appellant and her son $6.50. Therefore, the total need in the case is $118.50. After this figure is multiplied by the 75 percent control factor, the unmet need is $88.87. Since there is no income in the home at this time, the appellant was told that she would be receiving a grant of $89.00.

Due to the above it is the decision of this Hearing Officer to sustain the decision to lower this AFDC grant. Reference is made to Financial Services Handbook, Section 3122.2, which states, "When a recipient shares living arrangements with non-dependent relatives, his budget will carry his pro rata share and that of his dependants of the utility chart figure, provided the non-dependent relative does not meet this expense for him." Reference is also made to

Financial Services Handbook, Section 3122.3, which states, "When non-dependent relatives live with the applicant in his shelter, the applicant's pro rata share of the shelter expenses [within the group maximum] shall be an allowable expense, provided the non-dependent relatives do not meet this expense for him."

It is recommended that the worker initiate the proper procedures of that the action might become effective.

STATE DEPARTMENT OF
PUBLIC WELFARE

By /s/
Hearing Officer

Israel P. Garza
Type Name of Hearing Officer

P.O. Box 39[illegible] Harlingen, Tx
Type Address of Hearing Officer

DATE OF DECISION 9-10-71

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

HOUSTON WELFARE RIGHTS ORGANIZATION, INC., AGNES STAFFORD, INDIVIDUALLY AND ON BEHALF OF HER GRANDSON; DOROTHY MARIE PHOENIX, INDIVIDUALLY AND ON BEHALF OF HER THREE MINOR CHILDREN; AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

vs.

NO. CA-73-H-296
COMPLAINT CLASS ACTION

RAYMOND W. VOWELL, COMMISSIONER OF THE TEXAS STATE DEPARTMENT OF PUBLIC WELFARE, ET AL

DEPOSITION OF FELDON RAY LESTER, JR.

taken on the 24th day of April, A.D., 1973, beginning at 11:15 A. M., in the offices of the Legal Service Division, State Department of Public Welfare, Reagan Building, Austin, Texas, before Bette Jo Mitchell, a Notary Public in and for Travis County, Texas, pursuant to the following stipulation and waiver of counsel.

A P P E A R A N C E S :

FOR THE PLAINTIFFS:

MR. JEFFREY J. SKARDA, Houston Legal Foundation, 2912 Luell Street, Houston, Texas 77016.

FOR THE DEFENDANTS:

MRS. CAROLYN BUSCH, Legal Services Division, State Department of Public Welfare, Reagan Building, Austin, Texas;

Q What are your educational qualifications?

A B. A. in math from Texas A and M.

Q How long have you worked for the Texas State Department of Public Welfare?

A Since August 1st of '66.

Q And, during your time with the state department, have you primarily worked on computer operations?

A Yes.

Q Would you characterize yourself as a specialist in computer programs in the state department?

A Yes.

MR. SKARDA: I would like to introduce for the record Plaintiffs' Exhibit A, Caretaker Cases, Averages of Four Months. Why don't you number all of these.

(Instruments were marked Plaintiffs' Exhibits A, B, C, D, E, F, for identification)

Q (By Mr. Skarda) Mr. Lester, we have introduced Plaintiffs' Exhibit A through F. Plaintiffs' Exhibits A and B are averages of four months. It is my understanding that you had nothing to do with Plaintiffs' Exhibits A or B, is that correct?

A Correct.

Q Now, Plaintiffs' Exhibits C through F represent what I take to be computer print-outs that are the result of averaging for the months of November 1971 through August of 1972, is that correct?

A Yes.

Q What was your relationship to the programs supervision in developing these averages for each month?

A I was the analyst that set up the report to find the job for the programmer and was the supervisor of the project.

Q Did you outline the program that actually --

A Yes.

Q -- produced this?

A Yes.

Q What did the program -- What was it intended to do, its purpose, for each of these months?

A To total up -- to total the needs for the A. F. D. C. category and give some specific breakdowns of the needs, of the total needs. For instance, personal needs were broken down, housing, utilities, and social care and that sort of thing.

Q Let's look at the first month you did that, November of 1971, that is Plaintiffs' Exhibit C, is it not?

A Correct.

Q Now, would you please explain to me what these notations mean on each one of these? I think the first page of that exhibit says: Budgeted Amounts for A. F. D. C. Cases with No Caretaker Included. What does that mean?

A That means that we included in this part of the report only the A. F. D. C. cases that did not have a caretaker or certified eligible adult recipient in the house. The adult recipient was only the payee for the children.

Q There would only be children in that A. F. D. C. certified group then.

A That's correct.

Q On this first page you only average personal needs and housing, is that correct, by family size?

A Correct.

Q Now, the fact that there is a blank for family size of thirteen, fifteen and sixteen, does that mean there weren't families that large with these kind of characteristics?

A That's correct, there just happened not to be families with that number of people in the house.

Q Then, on the next page, you averaged in those for utilities, glasses and dentures, is that correct?

A Yes.

Q And, the third page would be for hearing aids, personal care, social care. And, then you have the total budgeted needs for that family. That would be a summary of the other figures.

A Yes, that is a summary of everything, excluding these special allowances of glasses, dentures and hearing aids allowances.

Q I see. Then, looking on page four of that, you begin picking up budgeted amounts for A. F. D. C. cases with one caretaker included.

A Yes, that's correct.

Q What does that mean, one caretaker?

A That means that we had one adult, A. F. D. C.

recipient in the family, a parent or grandparent, for the A. F. D. C.

Q And, on page seven you do it for A. F. D. C. cases with two caretakers. That would be your A. F. D. C. for each capacity situation, generally speaking?

A Well, I really can't speak on that as policy, but, yes, I am sure that is true.

Q That would mean there would be both a mother and father in the household that would be eligible for A. F. D. C.

A Yes, that's correct.

Q And, finally, on page ten, you have it with all caretakers included. Now, what does that mean exactly?

A That means that we did a sub-total here for the one and two caretaker families report and combined them into one report.

Q I see. This does not include the non-caretakers.

A That's true.

Q Okay.

A It does not include the no caretakers report.

Q Now, in developing each one of these sums, numbers of cases, and average figures for each item of need for each family size, depending upon whether it has no caretakers, one caretaker or two caretakers, did you average what was actually in the budgeting column for that family? Where did you get this figure for each?

A Now, you are speaking of which average?

Q Where did the figures come from for the amount

budgeted?

A That came by totaling of each of the specific items, personal needs, housing, utilities, glasses, dentures, hearing aids, professional care, social care, for each A. F. D. C. family.

Q Did you neglect any family when you did this?

A No, we didn't. We didn't include the medical assistance only cases, cases that do not get a grant. These figures are only taken for A. F. D. C. cases that were getting grants.

Q For A. F. D. C. cases that were getting grants then, your averaging process took into account every case.

A Every case, yes.

Q So it is what I think you would call an actual average.

A Yes, right.

Q You did this for four different months, November, '71, February, '72, May of '72 and August of '72, is that correct?

A Yes.

. . .

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

HOUSTON WELFARE RIGHTS ORGANIZATION, INC., AGNES STAFFORD, INDIVIDUALLY AND ON BEHALF OF HER GRANDSON; DOROTHY MARIE PHOENIX, INDIVIDUALLY AND ON BEHALF OF HER THREE MINOR CHILDREN; AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED

vs.

CA NO. 73-H-296
COMPLAINT CLASS ACTION

RAYMOND W. VOWELL, COMMISSIONER OF THE TEXAS STATE DEPARTMENT OF PUBLIC WELFARE, ET AL

DEPOSITION OF TERRY G. TEMPLE

taken on the 24th day of April, A. D., 1973, beginning at 11:40 A. M., in the offices of the Legal Services Division, State Department of Public Welfare, Reagan Building, Austin, Texas, before Bette Joe Mitchell, a Notary Public in and for Travis County, Texas, pursuant to the following stipulation and waiver of counsel.

A P P E A R A N C E S :

FOR THE PLAINTIFFS:

MR. JEFFREY J. SKARDA, Houston Legal Foundation, 2912 Luell Street, Houston, Texas 77016.

FOR THE DEFENDANTS:

MRS. CAROLYN BUSCH, Legal Services Division, State Department of Public Welfare, Reagan Building, Austin, Texas;

Q What are your educational qualifications, Mr. Temple?

A Well, I have a Bachelor's Degree, and I have had seven years experience with the department.

Q And, how long have you worked here at the state office?

A About two years; almost two years.

Q We have already introduced Plaintiffs' Exhibits A, B, C, D, E and F. I would like to draw your attention to Plaintiffs' Exhibits A and B, these are the averages of the four months. Did you prepare these averages?

A Yes, I did.

Q Now, what are these averages, what do they represent?

A They represent a compilation of the number of recipients we had, or the number of cases that we had in each family size during a four month period, or during four specified months on which we based these averages.

Q Now, these four specified months that you are talking about, are these the records from which you took those averages --

A Right.

Q -- Plaintiffs' Exhibits C through F.

A Yes.

Q Now, how would you go about arriving at the averaged figure? Let's look at the circumstances of the family of four, caretaker family, arriving at the housing figure.

A All right. In arriving at the housing figure for that size family, we took the number of cases that we had in a caretaker family.

Q Would that be on page ten of Plaintiffs' Exhibit C for the month of November, 1971?

A Yes. We would take this figure, which is sixteen thousand zero seventy-three cases, and we added, for each of these months, this number of persons, you know, that is specified here in this column. Then we also added the total amount that's budgeted for housing for that family size group for each of the four months, and then we divided this sum of the budgetary allowances by the sum of the number of cases, to arrive at the average for housing for that size family group.

Q Developing your average for the four families on Plaintiffs' Exhibit A, did you take this thirty-three dollar point three one seven figure for November and a similar figure for all of the other months and just average that together, or how did you do it?

A No, we took the total amount budgeted for housing in each of the months and came up with a grand total of money budgeted for housing. Then we took a total of the number of recipients, or number of cases, rather, for that family size in each of the months, added them together to come up with a grand total, and then we divided the grand total of cases into the grand total of housing that was budgeted.

Q Let's just go through with one example.

A All right.

Q For the family of four, housing in November of 1971, on page ten, five hundred thirty-five thousand five hundred three dollars and thirty cents was the total amount.

A Right.

Q That would be added to every other total amount and then divided by the sum of fourteen thousand one hundred seventy-two--

A No, no.

Q Please explain to me how that worked.

A Okay. This amount that is budgeted here for housing, five thirty-five five zero three thirty was the amount budgeted in four member families with caretakers for this month. We also took like figures in these other months for that family size and added those four totals together to come up with a grand total budgeted for housing for that family size group in these four months. Okay. Then, we divided that by the grand total of four person caretaker families in each of these four months. Now, this number here is the number of cases in which housing was budgeted.

Q And, did you use that figure to divide into the amount budgeted?

A No.

Q You didn't?

A No.

Q Why didn't you use that figure?

A We were consulting with Mr. Dudley Hall, who is from the regional H. E. W. Office, and he shared with us his feeling that H. E. W. would prefer that we include all persons who are in this family size group, rather than just those that had an expense for housing.

Q So those cases which weren't represented here on

page ten, in the figure of the number of cases budgeted for housing, represent those families that had zero needs budgeted for housing, basically.

A That's right. Apparently there were close to two thousand cases which had no housing expense during that month.

Q And, that way you accounted for the situations where zero need was budgeted for housing.

A We included those in the average.

Q Yes. Is the same thing true for the utilities figure?

A That is true for each item, utilities and each of the other items that was specified there.

Q Okay. Let's look at page eleven which has the utility figure for a family of four. There were twelve thousand six hundred twenty-four families budgeted for the utilities figure, however, again, there were sixteen thousand seventy-three families receiving a grant at that family size.

A Yes.

Q So the differences would account for those people who had zero utilities budgeted.

A Right.

Q That would also include all of your public housing people who didn't have a formal utilities allowance budgeted.

A That's correct.

Q Did you use any other documents or records other than the computer print-out to arrive at your averages?

A No.

MR. SKARDA: I have no further questions at this time.

MRS. BUSCH: I have no questions.

MRS. BROWN: Could we go off the record a minute.

(whereupon there was an off the record discussion)

MRS. BUSCH: We do have just a few questions.

CROSS EXAMINATION:

BY MRS. BUSCH:

Q Mr. Temple, I would like to pursue this point a little further in arriving at an average. Is it correct that in arriving at an average, it is necessary to include all cases?

A That's correct.

Q Otherwise, it would not be an average, --

A That's correct.

Q -- is that correct?

A Those are the guidelines under which we were working.

Q And, these are the guidelines from H. E. W.

A They were verbal instructions from Mr. Hall at H. E. W. as to his understanding of the draft guidelines.

Q All right. Now, one more point. If you had excluded all those cases that had a zero housing

allowance, and you arrived at not an overall average then, but just an average of those who had a housing allowance, and then when the new system was implemented you gave everyone the housing allowance that had been derived by selecting out those cases that had a housing allowance, would it then not be an expenditure over and above the prior expenditures?

A Yes, it would have. It wouldn't have been a true average.

Q It would not have been an average at all.

A No.

Q And, this, as you understood, was the reason that H. E. W. stated that we should average all grants.

A That's correct.

Q And, not just those that had a particular allowance.

A That's correct.

Q Because after the averaging was done, then every case would get that allowance.

A That's correct.

Q All right.

MRS. BUSCH: No further questions.

RE-DIRECT EXAMINATION:

BY MR. SKARDA:

Q In summary, let's just go over the pages. You prepared two different sets of averages for the four months. Plaintiffs' Exhibit A is for the caretaker

averages, and Plaintiffs' Exhibit B is for the non-caretaker averages, is that correct?

A That's correct.

Q Let's look at the caretaker cases for a family of four. In preparing the caretaker average, you were only concerned with those pages ten, eleven and twelve of each of the monthly print-outs, is that correct, for all caretakers?

A That is correct.

Q And, say for the housing figure of two thousand three hundred and nine two hundred ninety-nine point ninety-nine, that represents the sum of all the housing needs budgeted for four months, taken off of each of the four month periods, is that correct?

A That's correct, that is the sum total of the four months housing allowance.

Q And, the universe of sixty-eight thousand two hundred and forty-six cases represents the sum total of all the families that were receiving a grant for that family size, that would be taken off the first -- Well, the total listed budgeted family size, is that correct, and added together for each of the four months?

A That's correct.

Q And, then you divided the sixty-eight thousand two forty-six into the total housing figure to get the thirty-three point eight three eight.

A That's right.

Q That represented that part of the housing needs averaged together for the four member caretaker family. That was then added to all the other averages

that came up with your total average of one hundred eighty-six dollars eight six seven.

A That's right.

Q And, that figure was converted to what is essentially now represented in your Form 36, Plan 13, for A. F. D. C. single figure needs allowance of one hundred eighty-six point eighty-seven, is that correct?

A That was rounded to a hundred and eighty-seven dollars in our final figures, yes.

Q Okay.

MR. SKARDA: I have no further questions.

MRS. BROWN: I have just one question.

CROSS EXAMINATION:

BY MRS. BROWN:

Q Originally, when you set out to derive the averages working from the computer print-outs for each of the four months representing each of the four seasons of the year, what, if any, fiscal limitations or guidelines were you working under?

A We were not working specifically under any fiscal guidelines, except we knew that if we averaged the budgetary allowances that we had in our cases at the present time, that we should come out technically with the same amount of expenditures that we had prior to going to the flat average system.

Q So, in other words, you attempted to spend the same amount of money that the department was spending under the old system.

A That's correct.

MRS. BROWN: That is all.

MR. SKARDA: One last question, Mr. Temple. When did you do these averages?

A This was -- I have to look here for the specific date. It was in September of 1972.

MR. SKARDA: No further questions.

MRS. BUSCH: No questions.

MRS. BROWN: No questions.

_____

Terry G. Temple

SUBSCRIBED AND SWORN to before me, the undersigned authority, on this __day of _____, A. D., 1973.

_____

Notary Public

ARTICLE X

42 U.S.C. §602(a) (7) ( )--A State plan for aid and services to needy families with children must... (7) provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income....

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

* * *

NO. 77-719

* * *

JEROME D. CHAPMAN, COMMISSIONER OF THE TEXAS DEPARTMENT OF HUMAN RESOURCES, ET AL.,

Petitioners

V.

HOUSTON WELFARE RIGHTS ORGANIZATION, ET AL.,

Respondents

* * *

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ON A DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

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JEROME D. CHAPMAN, COMMISSIONER OF THE TEXAS DEPARTMENT OF HUMAN RESOURCES, ET AL.,

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ON A DECISION OF THE FIFTH CIRCUIT COURT OF APPEALS

* * *

The respondents, the Houston Welfare Rights Organization, Agnes Stafford, Dorothy Phoenix, Paula Ortega and Maria San Juana Ortega, appellants below, oppose the granting of a writ of certiorari to review a decision of the Fifth Circuit Court of Appeals of July 13, 1977.

QUESTIONS PRESENTED FOR REVIEW

Respondents would add the following questions in opposition to the writ for certiorari because they are dissatisfied with the statement of petitioner under Rule 40(3) of the Supreme Court Rules. Respondents begin with number four. Petitioners state the first three.

(4) Does 28 U.S.C. §1343(3) give federal district courts jurisdiction over a state-federal welfare conflict raising whether 42 U.S.C. §1983 or §602(a)(23) is an equal rights statute and whether 42 U.S.C. §1983 secures review of conflicts under the Supremacy Clause?

(5) Does the record clearly raise the jurisdictional issue or is it obscure because of respondents two attempts to amend their petition in district court pursuant to 28 U.S.C. §1653 to obtain pendent jurisdiction?

CONSTITUTIONAL AND OTHER PROVISIONS

Because respondents are dissatisfied with the statement of the statutes involved they quote three others pursuant to Rule 40(3) of the Supreme Court Rules.

The Jurisdictional provisions at 28 U.S.C. §1343(3&4)(added)

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:...(3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens.... (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

The right to amend at 28 U.S.C. §1653

> Defective allegations of jurisdiction may be amended, upon terms, in the trial or appellate courts.

STATEMENT OF THE CASE

On March 7, 1973, respondents, a welfare rights organization and individual recipient families, brought a welfare suit in federal district court to restrain a reduction in grants to smaller families (R.1-19). They lost the temporary motion and again lost on summary judgment, but prevailed on appeal only as to the proration point. In the heat of litigation they mistakingly, failed to allege pendent jurisdiction pursuant to Hagans v. Levine,415 U.S. 528(1974). When the district pointed their error out, the welfare recipients moved earnestly to amend. So earnestly that they will detail their attempts.

The recipients tried to amend their complaint to obtain pendent jurisdiction

under the method approved by Hagans v. Levine, 415 U.S. 528 (1974). They were so earnest in this effort that they will detail their attempts.

The district court first indicated jurisdictional problems in its memorandum and opinion dated February 11, 1975 (R. 288-305). Prior to signature of the judgment, respondents filed a motion to reopen the court's memorandum for leave to amend petition (R. 308-309). After signature of judgment, respondents again filed another motion to modify judgment for leave to amend petition (R. 317-318). The court denied both motions on May 9, 1975 (R. 319). The recipients marized this history in their notice of appeal to the Fifth Circuit (R. 320). The court cited the demands on its docket as the reason for denial of the motion. The court also erroneously spoke of the fact that respondents had their day in court. To the

contrary the court decided the case on the papers of cross motions for summary judgment. There was no trial and respondents had no opportunity to amend by oral motion.

Also the welfare recipients alleged an additional jurisdictional ground not rejected below 28 U.S.C. §1343(3)(first amended complaint, para. 3, p. 2 (R. 178-194)).

Perhaps a few words are appropriate on the merits. The welfare recipients brought this AFDC case as a challenge to the present flat grant established by consolidating the former itemized standard of need. Previously the petitioner budgetted four items of need. Now he budgets one figure from a schedule arrived at by averaging the former items.

The welfare recipients stated the issues around the level of the flat grant. They prevailed below on the levels added in for

shelter and utilities. The court of appeals held that these levels could not be prorated downward when the recipient lived with other persons. Petitioner asks for a writ of certiorari because of the required increase in the standard of need for some recipients.

ARGUMENT AGAINST GRANTING THE WRIT

Respondents address these arguments in the order of questions presented for review. Therefore they begin their argument with petitioner's first point on district court jurisdiction.

(1). Jurisdiction exists under 28 U.S.C. §1343(4)

Respondents recognize that the circuits conflict on 28 U.S.C. §1343(4) jurisdiction, but rely on the face of the jurisdictional provision and point out one limit in the breadth of petitioner's question. 28 U.S.C. §1343(4) gives federal district courts jurisdiction over "any civil action...to recover damages or to secure equitable relief under any Act of Congress providing for the protection of civil rights." Since 42 U.S.C. §1983 is a statute protecting civil rights, jurisdiction lies. The leading Fifth Circuit case of Gomez v. Florida State Employment Service, 417 F.2d 569 (5th Cir. 1969), supported the Fourth Circuit on the same position in Blue v. Craig, 505 F.2d. 830 (4th Cir. 1974). Furthermore other courts have recognized the wide scope of §1343(4) (Jones v. Mayer, 392 U.S. 409,412 n.1(1968);

Crowe v. Eastern Board of Cherokee Indians, 506 F.2d 1231, 1234(1974 Cir. 4) and Common Cause v. Democratic National Comm., 333 F. Supp. 803, 808 n.8(D.D.C. 1971)).

Petitioner indicates in his petition at p. 6 that the Fifth Circuit found no supremacy clause claim. The Fifth Circuit footnote merely does not use that label (A.B-30 n.1). Respondents argue that a federal-state conflict under the Social Security Act states a supremacy clause claim.

(2). There is no conflict with prior decisions of this court on the merits.

The Fifth Circuit held that the petitioner's proration policy presumed that a person living with the AFDC family contributes income to the family and thus violated 45 C.F.R. §233.90(a)(1976) and this court's decision in Van Lare v. Hurley, 421 U.S. 338 (1975). They would specifically point out that Van Lare was not available to the district court. The Fifth Circuit was the first court to apply it to the Texas policy.

Simultaneously petitioner hints at a

conflict between a prior decision of this court Jefferson v. Hackney, 406 U.S. 535 (1972), with the decision below. Jefferson involved an entirely different method of establishing need which took effect in 1969. The instant case deals with a standard of need effective four years later in 1973. The circuit court likewise considered this question and rejected it.

(3). There is no intrusion into state discretion to set the standard of need.

Congress limited state discretion to set its standard of need by 42 U.S.C. §602 (a)(23). This court has recognized this limitation in Dandridge v. Williams, 397 U.S. 471, 482(1970), and in Rosado v. Wyman, 397 U.S. 397(1970). Petitioner may not deprive welfare recipients of their 1969 cost of living increase.

(A4). Respondent's additional reasons for opposing the writ

Respondents urge two reasons not relied on by the court below for denying this writ of certiorari: an alternate ground for jurisdiction 42 U.S.C. §1343(3) and the fact that the district court denied respondent's motions to amend the petition to state a constitutional issue beyond the Supremacy Clause Claims. Respondents raise these supporting grounds as matters overlooked by the Court of Appeals (Dandridge v. Williams, 397 U.S. 471, 475 at n.6(1970); Aetna Casualty & Surety Co. v. Flowers, 330 U.S. 464, 468(1947); Bondholder's Com'e v. Com'r of Internal Revenue, 315 U.S. 189, 192 at n.2(1942); Langnes v. Green, 282 U.S. 531, 538-539(1931); United States v. Am. Ry. Express Co., 265 U.S. 425, 435-436 (1924)).

(4). Alternate jurisdiction under 42 U.S.C. §1343(3)

The court should not grant this petition for a writ of certiorari because there are additional grounds for alleged jurisdiction than those relied on by the district court. Respondent alleged jurisdiction on both 42 U.S.C. §1343(3) as well as 42 U.S.C. §1343(4). The district court merely found jurisdiction on the latter ground.

Plaintiffs argue that the Civil Rights Act, 42 U.S.C. §1983, provides a cause of action for when the right denied is a right secured by a federal statute. They urge two reasons in support. First, §1983 is an equal rights statute for the purposes of 28 U.S.C. §1343(3). And second, §1983 secures review of conflicts between federal and state law under the Supremacy Clause. In other words these conflicts are constitutional claims for the purposes of 28 U.S.C. §1343(3). (See Examining Board v. Otero, 426 U.S. 572(1976)).

The petitioner cites an abstract of a decision of the Third Circuit finding no jurisdiction under §1343(3)(Gonzales v. Young, _____F.2d._____, 46 L.W. 2065 (July 15, 1977, Cir. 3)). The court needs the full text because as early as 1947, the third circuit found jurisdiction in similar cases (Bomar v. Keyes, 162 F. 2d 136 (3rd Cir. 1947), cert. den. 332 U.S. 825(1947)). Later the Fourth and Fifth Circuits joined the third (Blue v. Craig, 505 F. 2d 830 (4th Cir. 1974); Gomez v. Florida State Et. Services, 417 F.2d 569 (5th Cir. 1969)).

As to the equal rights point, the court should also note that respondents plead a class action on a 42 U.S.C. §602(a)(23) claim with language of "unreasonable relation(ships)" and "unfair" discrimination (R. 178-194, First Amended Complaint para. 2d, p.2; para. 53, p.11; para. 59, p.11). This highest court has previously interpreted 42 U.S.C. §602(a)(23) to have the purpose of

"prod(ding) the States to apportion their payments on a more equitable basis" (Rosado v. Wyman, 397 U.S. 397, 413 (1970)). 42 U.S.C. §602(a)(23) addressed the unfairness of dollar maximums on welfare grants litigated as an equal protection case in Dandridge v. Williams, 397 U.S. 471,482(1970). Respondents plead an equal rights statute in their class action.

(5) . Obscurity of record given attempt to amend

The court should not grant this petition for a writ of certiorari because the record does not clearly raise the jurisdictional issue. Both after the trial court's opinion and again after entry of judgment, respondents moved for leave to amend their petition to state a constitutional issue beyond the Supremacy Clause claims . In those motions, they reminded the court that they briefed a due process issue in their motion for summary judgment. The district court denied their motion to amend the petition presumably because it found jurisdiction on alternate grounds now under challenge.

Respondents' motion was after notice and before judgment. It was timely and was entitled to consideration (McGovern v. American Airlines, Inc. 511 F.2d 653, 654(1975 Cir. 5); John Birch Society v. Nat'l Broadcasting Co., 377 F.2d 194, 199(1967 Cir. 2)). Under 28 U.S.C. §1653, respondents would be entitled

to amend (Schlesinger v. Councilman, 420 U.S. 738, 744 n.9(1975); Forman v. Davis, 371 U.S. 178(1962); Jones v. Freeman, 400 F. 2d 383-387(1968 Cir. 8); Dolche v. Board of Levee, 46 F. 2d 340, 342(E.D. La. 1930)). But it was unnecessary for the district court to reach that issue because it found jurisdiction on alternate grounds (United States v. Am. Ry. Express Co., 265 U.S. 531, 538-539 (1931)). Respondents sought rather neither to enlarge their own rights, nor lessen those of their adversary.

CONCLUSION

Respondents pray that the court deny the writ.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Jeffrey J. Skarda, attorney for respondents, hereby certify that three copies of the above document was delivered to counsel for petitioners, John L. Hill, David M. Kendall, Steve Bickerstaff, and David H. Young, P. O. Box 12548, Capitol Station, Austin, Texas, 78711, on the 11th day of December, 1977, by mail.

Jeffrey J. Skarda

IN THE

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OCTOBER TERM, 1977

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JEROME D. CHAPMAN, COMMISSIONER OF THE TEXAS DEPARTMENT OF HUMAN RESOURCES, ET AL.,

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HOUSTON WELFARE RIGHTS ORGANIZATION, ET AL.,

Respondents

* * *

PETITIONERS' BRIEF ON THE MERITS

* * *

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PETITIONERS' BRIEF ON THE MERITS

* * *

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The Petitioners, Jerome D. Chapman, Commissioner of the Texas Department of Human Resources, et al., successors in office to Defendants-Appellees below, respectfully submit this their Brief on the Merits.

OPINIONS BELOW

The Opinion of the United States District Court for the Southern District of Texas granting your Petitioners' (Defendants below) motion for summary judgment is reproduced in Appendix A to the Petition

for Writ of Certiorari and is reported at 391 F.Supp. 223 (S.D. Tex. 1975). The Opinion of the Court of Appeals for the Fifth Circuit reversing the District Court is reproduced in Appendix B to the Petition for Writ of Certiorari.

JURISDICTION

Judgment was entered by the Court of Appeals for the Fifth Circuit on July 13, 1977, and a rehearing was denied on August 22, 1977 (Appendices C and D, respectively, to the Petition for Writ of Certiorari). The Petition for Writ of Certiorari was filed on November 21, 1977, and granted on February 21, 1978. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) because the Opinion of the Court of Appeals for the Fifth Circuit conflicts with decisions of three other circuits as to jurisdiction, conflicts with prior decisions of this Court, and intrudes into an area of state discretion previously explicitly recognized by this Court.

CONSTITUTIONAL PROVISION, STATUTES AND REGULATION INVOLVED

United States Constitution, Article 6, Clause 2:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Civil Rights Act of 1871, 42 U.S.C. § 1983:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, or any

> State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

28 U.S.C. § 1343 provides in pertinent part:

> The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> . . .
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;
>
> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

42 U.S.C. § 601 provides:

> For the purpose of encouraging the care of dependent children in their own homes or in the homes of relatives by enabling each State to furnish financial assistance and rehabilitation and other services, as far as practicable under the conditions in such State, to needy dependent

children and the parents or relatives with whom they are living to help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection, there is authorized to be appropriated for each fiscal year a sum sufficient to carry out the purposes of this part. The sums made available under this section shall be used for making payments to States which have submitted, and had approved by the Secretary, State plans for aid and services to needy families with children.

Due to its substantial length, 42 U.S.C. § 602 of the Social Security Act is included herein as Appendix E to the Petition for Certiorari.

45 CFR § 233.90(a) (1976) provides in pertinent part:

In establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent . . . will be considered available for children in the household in the absence of proof of actual contribution.

QUESTIONS PRESENTED FOR REVIEW

I.

Does 28 U.S.C. § 1343(4) give federal courts jurisdiction over an action asserting that Texas' Aid to Families With Dependent Children Program failed to comply with federal requirements, under statute providing federal

jurisdiction to recover damages or to secure equitable or other relief under civil rights laws?

II.

(A) Does the decision of the Court of Appeals for the Fifth Circuit holding that Texas must recalculate its standard of need in the Aid to Families With Dependent Children Program conflict with this Court's prior ruling specifically upholding same in *Jefferson v. Hackney*, 406 U.S. 535 (1972)?

(B) Did the Court of Appeals misinterpret this Court's ruling in *Van Lare v. Hurley*, 421 U.S. 338 (1975), to apply to a state's calculation of its standard of need in addition to determinations concerning available income?

III.

Did the decision of the Court of Appeals for the Fifth Circuit intrude into the calculation of a standard of need in a state's Aid to Families With Dependent Children Program, an area explicitly reserved to the states by this Court in *Dandridge v. Williams*, 397 U.S. 471 (1970) and *Jefferson v. Hackney, supra?*

STATEMENT OF THE CASE

The facts are adequately set out in the opinions below and are only briefly summarized here.

The State of Texas participates in the Aid to Families With Dependent Children Program which is administered through its Department of Human Resources, formerly the Department of Public Welfare. Prior to March 1, 1973, Texas defined three categories

in establishing its standard of need in this financial assistance program (personal needs allowance, shelter allowance and utilities allowance) with ceilings in each. The sum of the amounts determined under each category calculated for the family unit was the "standard of need." Due to the limited availability of funds, a percentage reduction factor of 75% was applied to the standard of need and payments were made to each recipient in the reduced amount, less any income received other than the Aid to Families With Dependent Children grant.

On March 1, 1973, Texas consolidated the above allowances into one need figure determined by the size and composition of the household. The 75% percentage reduction factor was retained.

Both before and after the March 1 consolidation Texas prorated a recipient's shelter and utility expenses in calculating the standard of need if one or more noneligible individual(s) resided with the recipient. This proration has traditionally been made in order to take advantage of economies of scale and to prevent the State's limited financial resources available for Aid to Families With Dependent Children from being diverted to the benefit of ineligible persons. Economies of scale exist as household size increases; and if Texas allowed the "needs" of ineligible persons to be added to the needs it recognizes for eligible persons living in the same household, the obvious effect would be to increase the total level of financial assistance to a sum sufficient to satisfy their combined needs, even though some of the individuals living in the household are admittedly ineligible. It is this proration policy which was upheld by the District Court but overturned by the Court of Appeals, even though the policy had not been changed in the March 1, 1973, revision which prompted the litigation. Both Courts found federal jurisdiction to

exist pursuant to 28 U.S.C. § 1343(4).

SUMMARY OF THE ARGUMENT

The determination of the Court of Appeals for the Fifth Circuit that there is jurisdiction in the instant cause pursuant to 28 U.S.C. § 1343(4) conflicts with the decisions of three other circuits. The Fifth Circuit erroneously ruled that an alleged statutory conflict between a state regulation and the Social Security Act, absent any substantial constitutional claim, was sufficient to confer jurisdiction.

The Fifth Circuit decision on the merits was that Texas' proration of shelter and utilities violates the cost-of-living increase requirement of 42 U.S.C. § 602(a)(23), even though Texas indisputably did make a cost-of-living adjustment pursuant to that statute which was applied to all items included in the standard of need and was previously upheld by this Court in *Jefferson v. Hackney, supra,* at 543-544.

To reach this wholly unwarranted result the Fifth Circuit misinterpreted this Court's opinion in *Van Lare v. Hurley,* 421 U.S. 338 (1975), and applied its holding regarding the contribution of unverified *income* to Texas' budgetary standard of need, an entirely different process governed by different requirements of the Social Security Act, 42 U.S.C. § 601 *et seq.*

Finally, the Fifth Circuit decision intrudes into the calculation of the standard of need in Aid to Families With Dependent Children, an area of discretion explicitly reserved to the states' policy-making process by the Social Security Act and this Court in *Jefferson v. Hackney, supra; Dandridge v. Williams, supra;* and *King v. Smith,* 392 U.S. 309 (1968).

ARGUMENT

I.

THE COURTS BELOW ERRONEOUSLY ASSUMED JURISDICTION PURSUANT TO 28 U.S.C. § 1343(4).

Since this Court's decision in *Hagans v. Lavine*, 415 U.S. 528 (1974), there has continued to be substantial question as to federal court jurisdiction over allegations that state regulations conflict with a federal statute and must be overturned due to the Supremacy Clause. U.S. Const., Art. 6, Cl. 2. In the instant cause it is alleged that Texas' traditional policy of prorating shelter and utility factors in establishing its "standard of need" in the Aid to Families With Dependent Children Program (A-19 in Petition for Writ of Certiorari) violates the cost-of-living increase requirement found in the Social Security Act at 42 U.S.C. § 602(a)(23). Both Courts below found only a statutory claim and specifically did not find a constitutional claim; therefore, the constitutional argument will be addressed herein only to the limited extent necessary to understand the statutory claim. (A-8 & 9, B-30 in Petition for Writ of Certiorari).

Simply stated, 28 U.S.C. § 1343(3) provides federal jurisdiction to claims based upon the Constitution or federal statutes ". . . providing for equal rights . . ." while 28 U.S.C. § 1343(4) provides jurisdiction to claims based upon federal statutes "... providing for the protection of civil rights ...." This Court has previously indicated that the Social Security Act is not a statute providing for "equal rights" in *Aguayo v. Richardson*, 473 F.2d 1090, 1101, cert. den. sub nom. *Aguayo v. Weinberger*, 414 U.S. 1146 (1974). This view has been followed in *Randall v. Goldmark*, 495 F.2d 356 (1st Cir. 1974) and *Andrews v. Maher*, 525 F.2d 113 (2d Cir. 1975). Despite the clear language of the above cases and the findings of both Courts below that there is no constitutional claim in the instant cause, Respondent does argue that it attempted to state a constitutional claim premised upon the Supremacy Clause. Petitioner would simply observe that the Supremacy Clause has been held not to "... secure rights to individuals; it states a fundamental structural principle of federalism. While that clause is the reason why a state law that conflicts with a federal statute is invalid, it is the federal statute that confers whatever rights the individual is seeking to vindicate." *Gonzales v. Young*, 560 F.2d 160, 166 (3rd. Cir. 1977); *Andrews v. Maher, supra*, at 118-119.

The jurisdictional dispute in this cause is whether, in the absence of a substantial constitutional claim such as that in *Hagans v. Lavine, supra*, 42 U.S.C. § 1983 gives rise to a "right" cognizable under 28 U.S.C. § 1343(4). Stated another way, the issue may be viewed as one of whether 42 U.S.C. § 1983 may be used to vindicate a "statutory right" arising under the Social Security Act as an Act of Congress" ... providing for the protection of civil rights ...." Petitioner urges that the answer to these questions is "No" and that *Gonzales v. Young, Andrews v. Maher*, and *Randall v. Goldmark, supra*, all correctly so determined.

It should be noted that 42 U.S.C. § 1983 was read by the Fifth Circuit in *Gomez v. Florida State Employment Service*, 417 F.2d 569, 580 n. 39 (5th Cir. 1969), as an Act providing for the protection of "civil rights" cognizable under 28 U.S.C. § 1343(4); yet, subsection (4) was added to § 1343 and then only as a technical amendment in the Civil Rights Act of 1957. Congress did not intend to affect or expand the jurisdictional scheme and expressly stated that "These amendments are merely technical amendments to the Judicial Code so as to conform it with amendments made to existing law by

the preceding section of the bill." House Report No. 291, April 1, 1957, *U.S. Code Cong. and Admin. News*, page 1976. The Fifth Circuit's alteration of 42 U.S.C. § 1983 from a statute which fashions remedies into a jurisdictional statute is warranted by neither the legislative history nor public policy. Other policy aspects of this particular cause will be addressed in later sections of this brief; still even without further discussion of policy, the law is clear that there is no fundamental right to welfare and to fabricate a statutory "right" under 42 U.S.C. § 1983 is, as the Third Circuit described it, a "chicken-and-egg approach." *Gonzalez v. Young, supra*, at 168; *Burns v. Alcala*, 420 U.S. 575 (1975). There simply was no Social Security Act when 42 U.S.C. § 1983 was passed as the Civil Rights Act of 1871 and not even the Fifth Circuit has held since that time that welfare is a "right." *Gonzales v. Vowell*, 490 F.2d 475 (5th Cir. 1974).

In summary, Petitioner does not dispute that including a substantial constitutional claim would allow a plaintiff to litigate a statutory claim pursuant to pendent jurisdiction as interpreted by *Hagans v. Lavine, supra*. Petitioner does assert that the Courts below incorrectly assumed jurisdiction over the statutory 42 U.S.C. § 1983 claim in the absence of any constitutional claim; and, alternatively, that even if Respondent is found to have a Supremacy Clause claim, it does not present a "substantial" constitutional claim for jurisdictional purposes.

II.

THE DECISION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT CONFLICTS WITH PRIOR DECISIONS OF THIS COURT.

A. The Fifth Circuit Decision Contravenes *Jefferson v. Hackney*.

In its reversal of the District Court's decision that Texas complied with 42 U.S.C. § 602(a) (23) as to the proration issue the Fifth Circuit ignored this Court's holding in *Jefferson v. Hackney, supra* (B-35 to 40 in Petition for Writ of Certiorari). In *Jefferson* this Court specifically determined that Texas was in compliance with the requirements of Subsection (23), citing *Rosado v. Wyman*, 397 U.S. 397 (1970), and held that there were two broad purposes to the requirement:

> First, to require States to face up realistically to the magnitude of the public assistance requirement and lay bare the extent to which their programs fall short of fulfilling actual need; second, to prod the States to apportion their payments on a more equitable basis.

This Court then went on to find that "Texas has complied with these two requirements." *Jefferson v. Hackney, supra*, at 543-544. Nevertheless, the Fifth Circuit overturned the District Court's determination, based on *Jefferson v. Hackney, supra* (A-17 to Petition for Writ of Certiorari), and in effect, if not in literal language, found Texas in violation of 42 U.S.C. § 602(a) (23). Petitioner would again emphasize that this action was taken absent even a rudimentary analysis of the import of *Jefferson v. Hackney, supra*, and, in fact, without mentioning it. It is mentioned later in the Fifth Circuit opinion (B-42 to 45 in Petition for Writ of Certiorari) when that Court discusses Texas' consolidation to a flat-grant system, but there it is noted that Texas complied with 42 U.S.C. § 602(a) (23) requirements, citing *Jefferson v. Hackney, supra*.

The erroneous distinction implicit in the Fifth Circuit's reasoning is that on the one hand Texas has latitude in "pricing" and "averaging" items to be included in its standard of need (B-43 to Petition for

Writ of Certiorari) but cannot decide what costs should be included or excluded in the first place (B-39 to Petition for Writ of Certiorari). The interpretation has the obvious result of removing a state's discretion to establish its own standard of need as provided by 42 U.S.C. §§ 601 and 602(a) because it requires a state to include items of need in its calculations which, as a matter of public policy, it does not choose to provide, i.e., shelter and utilities for *ineligible* persons. The Fifth Circuit has simply substituted its judgment for that of the State.

Texas is aware that the Fifth Circuit formally premised its decision on a Department of Health, Education and Welfare regulation found at 45 CFR § 233.90(a) (1976); however, if that regulation is the sole basis for the decision, rather than a specific statutory provision, then the answer to the jurisdictional issue herein must surely be in the negative. A regulation standing alone, whatever its content, is not a statute providing for "civil rights." It is not a statute at all and does not furnish even a colorable basis for federal jurisdiction under 28 U.S.C. § 1343(4). Texas disputes the Fifth Circuit's conclusion that it is not in compliance with the regulation on the same basis that it argues that it is not out of compliance with the requirements of the Social Security Act, and further states that the Department of Health, Education and Welfare regulation was not even in effect in 1973 when the challenged actions occurred.

B. The Fifth Circuit Decision Misinterprets *Van Lare v. Hurley.*

The stated justification for the Fifth Circuit's reversal of the District Court is this Court's decision in *Van Lare v. Hurley, supra,* which was entered after the District Court decision (B-35 to Petition for Writ of Certiorari). The message of *Van Lare* and preceding cases, *Lewis v. Martin,* 397 U.S. 552 (1970), and *King v. Smith, supra,* however, is clear. Texas cannot presume a contribution of *income* that is unverified simply because an alleged "substitute father," "adult male person assuming the role of spouse," "non-adopting stepfather," or "lodger" is present in the Aid to Families With Dependent Children recipient's home. That is not what the Texas policy does.

The New York regulation overturned by this Court in *Van Lare v. Hurley, supra,* addressed the application of unverified "income and resources" in determining Aid to Families With Dependent Children eligibility. The Texas policy, on the other hand, speaks only in terms of budgeting a standard of need and the item(s) to be included therein. The objectionable feature of the New York regulation was a presumption of income available to the Aid to Families With Dependent Children recipient. Texas' policy is totally devoid of any mention of income and is determined without regard to any income calculations, whether presumed, unverified, or otherwise. It deals only with the budgetary needs of the family.

The process of determining the Texas Aid to Families With Dependent Children recipient's grant went through at least four stages prior to March 1, 1973: (1) the maximum standard of need was established, (2) the number of eligible recipients and the budgetary standard of need was established, not to exceed the maximum, (3) the recognized standard of need was ascertained by application of the percentage reduction factor of 75%, and (4) an amount of non-exempt income was established and deducted from the recognized standard of need to obtain the amount of the grant. The Texas proration factor operated at the second level and did not involve a presumption of income. The New York regulation operated at the fourth level, involving an income calculation, and did involve a presumption of income.

The difference in the two policies can be succinctly shown by considering the effect on eligibility a non-contributing "lodger" who earns $10,000.00 per month would have on an applicant. The New York regulation would presume the $10,000.00 was available and being used to satisfy the needs of the applicant's family, rendering them ineligible even though the "lodger" in fact contributes nothing to their support nor is he or she legally obligated to do so. The Texas regulation does not even consider the $10,000.00 per month income of the lodger and treats this particular non-contributing "lodger" the same as any other. The shelter and utility expenses are pro-rated and a grant is initiated, albeit in a slightly smaller amount than would be the case if the "lodger" were not there taking up space.

As unlikely as the above example may seem it does serve to demonstrate the distinction between the New York and Texas policies. The fact that there may be few Aid to Families With Dependent Children applicants who live with a lodger who has a $10,000.00 per month income does not affect the example's validity, because the result is the same *regardless* of the amount of his or her income. The $10,000.00 per month figure only serves to highlight the very substantial and fundamental distinction between a state's process of establishing a standard of need, as Texas has done, and unverified assumptions as to the availability of income as instituted by New York.

III.

THE DECISION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT INTRUDES INTO AN AREA OF STATE DISCRETION.

Calculation of a standard of need in the Aid to Families With Dependent Children Program is a matter

within each state's discretion. 42 U.S.C. §§ 601 and 602. *Jefferson v. Hackney, Dandridge v. Williams*, and *King v. Smith, supra.* In fact, probably the most frequently overlooked legislative language regarding Aid to Families With Dependent Children may be found at 42 U.S.C. § 601, wherein it is provided that the Program is "For the purpose of *encouraging* the care of dependent children . . . *by enabling each State* to furnish financial assistance and rehabilitation and other services, as far *as practicable under the conditions in such State* . . . (emphasis added)."

Texas' position is that in establishing its standard of need it is determining a condition of eligibility, ("need") and that it is free to restrict eligibility, if that be the effect of its long-standing proration policy, unless Congress has acted to forbid the restriction. There is no Congressionally enacted restriction applicable to this cause. Quite the opposite, there is the previously cited Congressional authorization for Texas to set its own standard of need by its own policy choices.

This state discretion was recognized by this Court in the landmark case of *King v. Smith, supra*, at 334, which held that states have ". . . undisputed power to set the level of benefits and the standard of need . . . ." Making the point even more clearly, this Court said at 318 "There is no question that States have considerable latitude in allocating their AFDC resources, since each State is free to set its own standard of need . . . ."

The Texas policy of not including shelter and utility "needs" of ineligible persons in its Aid to Families With Dependent Children standard of need is as permissible and complimentary a policy as those upheld by this Court in *New York Department of Social Services v. Dublino*, 413 U.S. 405 (1973) and *Wyman v. James*, 400 U.S. 309 (1970). The purpose of all such policies is to

ensure that state funds are expended only on behalf of *individuals who the state determincs are needy* (and who also meet the federal "categorical relatedness" requirement, i.e., an Aid to Families With Dependent Children child must be "deprived of parental support" as well as needy). The policies in the above cases take different approaches to different aspects of the problem, but all address the same fundamental issue in a way the particular state determines to be appropriate.

It should be undisputed that Texas has great latitude in dispensing its available funds and that federal law does not prevent it from balancing the stresses which uniform insufficiency of payments imposes on all Aid to Families With Dependent Children families by considering in computing need the comparatively greater ability of larger families to accomodate their needs to diminished per capita payments because of inherent economies of scale. *Dandridge v. Williams, supra*, at 542-544. The policy judgment being defended in this litigation is of exactly that nature. The only distinction is that, in a very limited manner, it extends far enough beyond the eligibile Aid to Families With Dependent Children family unit to recognize the existence of an ineligible person in the same household. To do otherwise is to be blind to reality, a burden a state does not knowingly assume when choosing to participate in the Aid to Families With Dependent Children Program. Given the fact that Texas' proration policy operates within an area of permissible state discretion, a federal court should not undertake to substitute its view of what the policy ought to be even if it thinks the state policy is ill-advised or even simply wrong. This is exactly what the Fifth Circuit has done and is why its decision should be overturned.

CONCLUSION

This Court should rule that neither the Social Security Act nor 42 U.S.C. § 1983 *creates* any *rights* enforceable in federal court pursuant to 28 U.S.C. § 1343(3) or (4) and reverse the decision of the Court of Appeals for the Fifth Circuit remanding the case with instructions to dismiss the Complaint. Alternatively, the Court should reverse the decision of the Court of Appeals for the Fifth Circuit and affirm the decision of the District Court on the merits for the reasons heretofore stated.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, DAVID H. YOUNG, Assistant Attorney General of Texas and a member of the Bar of the Supreme Court, do hereby certify that three copies of the foregoing Brief for Petitioner have been served on Respondents by placing same in the United States Mail, certified, postage prepaid, addressed as followes: Mr. Jeffrey J. Skarda, 2912 Luell Street, Houston, Texas 77093 and to Mr. John Williamson, Texas Rural Legal Aid, 305 E. Jackson Street, Suite 122, Harlingen, Texas, 78550, on this ___ day of _____, 1978.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-719

JEROME D. CHAPMAN, COMMISSIONER OF THE TEXAS DEPARTMENT OF HUMAN RESOURCES, *et al.*,

Petitioners,

—v.—

HOUSTON WELFARE RIGHTS ORGANIZATION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-719

JEROME D. CHAPMAN, COMMISSIONER OF THE TEXAS DEPARTMENT OF HUMAN RESOURCES, *et al.*,

Petitioners,

—v.—

HOUSTON WELFARE RIGHTS ORGANIZATION, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENTS

Opinion Below

The decision of the Court of Appeals which is set out in the Appendix to the Petition for a Writ of Certiorari has now been reported at 555 F.2d 1219 (5th Cir. 1977).

Additional Regulations Involved

1. Petitioner excerpted a portion of 45 C.F.R. §233.90(a) (1976) in its brief. That regulation, and 45 C.F.R. §233.20 (a)(2)(viii), were amended in 1977 to implement this

Court's decision in *Van Lare* v. *Hurley*, 421 U.S. 338 (1975) in 42 Fed. Reg. 6584 (Feb. 3, 1977) and now provide:

45 C.F.R. § 233.20 Need and amount of assistance.

(a) *Requirements for State Plans.* A State Plan for OAA, AFDC, AB, APTD or AABD must, as specified below:

• • • • •

(2) Standards of assistance. • • •

• • • • •

(viii) Provide that the money amount of any need item included in the standard will not be prorated or otherwise reduced solely because of the presence in the household of a non-legally responsible individual; and the agency will not assume any contribution from such individual for the support of the assistance unit.

• • • • •

§ 233.90 Factors specific to AFDC.

(a) *State plan requirement.* A State plan under title IV-A of the Social Security Act must provide that the determination whether a child has been deprived of parental support or care by reason of the death, continued absence from the home, or physical or mental incapacity of a parent, or (if the State plan includes such cases) the unemployment of his father, will be made only in relation to the child's natural or adoptive parent, or in relation to the child's stepparent who is ceremonially married to the child's natural adoptive parent and is legally obligated to support the child under State law of general applicability which requires stepparents to support stepchildren to the same extent that natural or adoptive parents are required to support their children. Under this requirement, the inclusion in the family, or the presence in the home, of a "substitute parent" or "man-in-the-house" or any individual other than one described in this paragraph is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State; nor may the State agency prorate or otherwise reduce the money amount for any need item included in the standard on the basis of assumed contributions from nonlegally responsible individuals living in the household. In establishing financial eligibility and the amount of the assistance payment, only such net income as is actually available for current use on a regular basis will be considered, and the income only of the parent described in the first sentence of this paragraph will be considered available for children in the household in the absence of proof of actual contributions.

2. The State regulations in effect in 1971 and 1972 which are at issue in this case were contained in Texas Department of Public Welfare Financial Services Handbook, Revision No. 23:

"When a recipient shares living arrangements with non-dependent relatives, his budget will carry his prorata share and that of his dependents of the utility chart figure, provided the non-dependent relative does not meet this expense for him." § 3122, ¶ 5.

"When non-dependent relatives live with the applicant in his shelter, the applicant's prorata share(s) of the shelter expenses [within the group maximum] shall be

an allowable expense, providing the non-dependent relatives do not meet this expense for him." § 3122.2, ¶ 5.

Questions Presented

1. Did the district court have jurisdiction without regard to the amount in controversy under 28 U.S.C. §§ 1343(3) or 1343(4) to decide whether Texas welfare regulations conflict with federal requirements imposed on the states by the Social Security Act and the Supremacy Clause of the United States Constitution?

2. May Texas' current needs standards, which are required by section 402(a)(23) of the Social Security Act, 42 U.S.C. § 602(a)(23), to reflect fully the extent to which the state's actual benefits are meeting the 1969 needs levels identified by the state be based in part on 1969 shelter and utilities allowances which did not reflect full shelter and utility needs because they had been unlawfully reduced by prorating?

Statement of the Case

Respondents brought this case in March 1973 to challenge the validity of new needs standards adopted on March 1, 1973 by the State of Texas for its Aid to Families with Dependent Children (AFDC) program. As the result of the changes made by Texas, 228,584 families in Texas, including two of the respondents' families, suffered reductions in cash assistance, while 2,747 families including one

[1] Defendants' Answer to Interrogatory No. 7, p. 3, Record in Court of Appeals, R. 75. Respondents Phoenix's and Ortega's grants

respondent family lost eligibility for cash assistance, and therefore medical assistance, altogether.[1] Since benefits in Texas were clearly among the lowest in the country in any event, respondents were severely harmed by these changes.[2]

The needs standards used by Texas until March 1973 consisted of several components, an allowance for personal needs for each individual,[3] a shelter allowance,[4] a utility

were reduced from $148 to $140, and $89 to $86, respectively, and respondent Stafford and her grandchild lost eligibility altogether. App. 9-11. Medical benefits under the Texas federal-state medical assistance program are provided only to individuals eligible to receive cash assistance, and certain other small groups not relevant herein. Section 1902(a)(10) of the Social Security Act, 42 U.S.C. §1396a(a)(10); Vernon's Ann. Texas Stat., Art. 695j-1 (Supp. 1978); Texas Dept. of Human Resources AFDC Handbook §4100 (June 1976). Such benefits are worth approximately $30 per person per month. HEW, HCFA Office of Research, Report B-1, Table 3, p. 9 (July 1977); HEW, SSA Office of Research, Public Assistance Statistics, Report A-2, Table 4 (July 1970).

[2] In 1969 the actual Texas benefit, which was below the standard as will be explained *infra*, was the 44th lowest benefit for an AFDC family of two and 45th for an AFDC family of four. Texas has not increased AFDC benefits since then. In 1973, when this suit was filed, Texas provided the 45th lowest benefit to AFDC families of two and of four in 1973. By 1977 it had sunk to the 49th lowest benefit to an AFDC family of two and the 48th lowest benefit to an AFDC family of four. HEW National Center of Social Statistics Report D-2, July 1969, Tables 3, 4; July 1973, Tables 5, 6; July 1977, Tables 2, 4. (While AFDC recipients are also entitled to food stamps, those limited additional benefits do not improve their comparative standing with the rest of the country.)

[3] $65 for each adult, $25 for each child under 18 years of age, and $39 for each child 18-21 years of age and in school. App. A-8.

[4] For private housing, actual cost up to a maximum of $33 for a family of one or two, $44 for a family of three or four, and $50 for a family of five or more; for public housing, $36 for a family of one, $42 for a family of two to four, and $50 for a family of five or more. App. A-8. These ceilings were well below the average rents being paid by families, App. A-43-44.

allowance,[5] and certain special needs allowances, that were added together to provide a standard for each family. This standard was then reduced by a 75% percentage reduction factor, and any outside countable income was then subtracted from the reduced standard in order to determine the amount of the benefit. These standards had been set in 1969 and reflected an 11% cost of living increase over the prior standards, as required by section 402(a)(23) of the Social Security Act, 42 U.S.C. §602(a)(23).

Prior to 1973, Texas prorated AFDC payments. The shelter and utilities standards were reduced before the 75% factor was applied if there was a relative who was not eligible for AFDC benefits living with the AFDC family. The amount added for shelter in these cases was determined by first considering the lower of the actual rent, or the maximum shelter allowance, for the entire household including the ineligible relative, and then by dividing that lower amount by the number of people in the household and assigning a pro rata shelter allowance to each individual in the household. The shelter allowance for the AFDC family was then computed by adding together the pro rata shares of the AFDC recipients.

The effect of this policy can be seen in respondent Ortega's case. Paula Ortega and her 11 year old son Reymundo received AFDC benefits. Paula's disabled sister, Maria San Juana, also lived with the family and received public assistance under the then-existing federal-state Aid to the Disabled program, Title XIV of the Social Security Act, 42 U.S.C. §1351ff, repealed 86 Stat. 1484. Paula's destitute mother also resided with the family. The family had no income other than public assistance.

[5] The utility allowance was a flat $13 per family.

The actual shelter cost for the whole household was $51.33. Texas' maximum shelter allowance was $33 for a two-person household and $44 for a four-person household. If the family had consisted of four AFDC recipients with no other income, its shelter allowance would have been $44. If the family had consisted of two AFDC recipients without other income living alone, its shelter allowance would have been $33. The standard for Paula Ortega and her child, however, was only $22, or two-fourths of the four-person standard. The sister who was receiving Aid to the Disabled had a standard of $11, one-fourth of the four-person standard. After the 75% reduction, the family actually received $24.75 toward its actual shelter cost of $51.33. App. A-6. Texas also prorated the maximum $13 allowance for utilities among the total number of persons in the household, so that Paula Ortega and her child had a standard of $6.50 instead of $13, and her sister had a standard of $3.25.

In 1973 Texas moved from the use of individualized needs standards to simpler consolidated standards which were derived by averaging the actual needs standards of the entire caseload during selected months of the prior year to produce an amount which constituted the needs standard for all families of that size.[6] Texas engaged in averaging in order to comply with section 402(a)(23) of the Social

[6] The new monthly standards were:

Family size	1	2	3	4	5	6	7	8	9	10
Caretaker not included	$32	$ 62	$ 90	$118	$146	$174	$202	$230	$258	$286
Caretaker included	$ 0	$115	$155	$187	$218	$246	$273	$300	$326	$353

App. A-9. These standards were reduced by the 75% factor before benefits were determined.

Security Act, 42 U.S.C. §602(a)(23), which required states to increase their standards of need by July 1, 1969 to fully reflect changes in the cost of living and to maintain these current standards thereafter. This Court had held that states could consolidate standards but could not thereby effect a reduction or an obscuring of the full 1969 standards. *Rosado* v. *Wyman*, 397 U.S. 397, 412-15 (1970).

The Texas prorating policy was not directly applied to any families after the new consolidated standards took effect on March 1, 1973.[7] Nonetheless, the new consolidated standards for all families were lower than they would have been if there had been no prorating policy prior to 1973 because they were based on an average that included reduced prorated shelter and utility allowances.

The inclusion of prorated allowances in the averaging had a particularly adverse effect on small families. App. A-37, 38. Indeed, even the Ortega family, no longer subject to prorating of its shelter and utility allowances, found its grant after March 1, 1973 reduced by $3 compared to the amount which they had been receiving under the prorated standards.[8] All in all, the inclusion of prorated allowances in the averages on which the 1973 consolidated standards were based resulted in expenditures 7% (or, at the current

[7] Texas states that "before and after the March 1 consolidation Texas pro-rated a recipient's shelter or utility expenses in calculating the standard of need if one or more non-eligible individual(s) resided with the recipient." Petitioners' Brief at 6. Since such calculations were no longer made in the individual case after March 1, Texas must be referring to the lowering of the consolidated standard by the inclusion of prorated standards in the average. See also the opinion of the Court of Appeals below, App. to Petition for Writ of Certiorari, B-33.

[8] The effect of the change in computation for the Ortega family is as follows (App. A-11):

time, some $9 million dollars) less than they would have been had such prorated allowances not been included. Texas Dept. of Human Resources, Proposed 1979-81 Budget Issues, p. 15. Texas therefore became one of those states that did not have to "face up realistically to the magnitude of the public assistance requirement and lay bare the extent to which their programs fall short of fulfilling actual need" as required by section 402(a)(23). *Rosado* v. *Wyman*, *supra*, 397 U.S. at 412-13.

On March 7, 1973 respondents filed suit to set aside the new consolidated standards. While respondents raised a number of challenges to the computation of the new standards under the governing Social Security Act, no constitutional claims were made in the original complaint.[9] Juris-

Before March 1, 1973		*After March 1, 1973*	
Personal needs:			
$65 × 1 adult = $65			
$25 × 1 child = $25			
½ of $44 housing allowance for 4 persons in private housing	= $22		
½ of $13 utility allowance	= $ 6.5	Single figure needs allowance for caretaker family of two	$115
Special needs	= $ 0		
Total needs	$118.5		$115
Recognized needs (75%)	$ 88.88		$ 86
Minus income	$ 0		$ 0
Actual AFDC grant	$ 89		$ 86

[9] As discussed more fully in note 46 *infra*, the respondents attempted to amend their complaint to raise a constitutional claim by motions after the district court issued its memorandum and opinion and then after final judgment was entered. App. A-15, A-16. The district court denied both motions. Respondents challenged the district court's denial of the motions in their Notice of Appeal to the Fifth Circuit, but the Fifth Circuit did not have to reach this issue.

diction was alleged under 28 U.S.C. §§1337 and 1343(3) and (4). On cross motions for summary judgment, the District Court found jurisdiction under section 1343(4). On the issue before this Court on the merits, the validity of using prorated standards in developing the consolidated standards, the District Court sustained the prorating policy, relying primarily on the Second Circuit decision in *Taylor* v. *Lavine*, 497 F.2d 1208 (1974). The Court of Appeals affirmed the District Court's ruling on jurisdiction and reversed on the merits, finding that *Van Lare* v. *Hurley*, *supra*, reversed *Taylor* and was controlling, and held that Texas therefore must recompute its standards based upon the 1969 standards which complied with the requirements of the Social Security Act.

SUMMARY OF ARGUMENT

I.

Respondents in this case challenge Texas welfare regulations on the ground that they conflict with federal requirements imposed by the Social Security Act. The case involves important issues of federal policy as well as the allocation of millions of dollars of federal aid. The district court had jurisdiction over respondents' claims under three separate heads of federal jurisdiction.

First, it is firmly established that challenges to state welfare rules on the ground that they conflict with the Social Security Act rest on the Supremacy Clause of the United States Constitution. Article VI, cl. 2. Respondents therefore stated a claim for relief under 42 U.S.C. § 1983, which since its enactment in 1871 has provided a cause of

action to redress violations of "rights, privileges and immunities secured by the Constitution." Civil Rights Act of 1871, Act of April 20, 1871, ch. 22, 17 Stat. 13. The district court had jurisdiction to hear this Supremacy claim under 28 U.S.C. § 1343(3), which reaches any action authorized by section 1983 to redress the violation of Constitutional rights.

The language of section 1983 is extremely broad and admits of no exception for rights secured by the Supremacy Clause. Nearly identical language in related civil rights statutes has been construed by this Court as reaching rights protected by *all* parts of the Constitution. Furthermore, a major purpose of section 1983 and the other civil rights laws and Amendments adopted by the Reconstruction Congress was to reaffirm the Supremacy of federal law, which had been questioned by pro-slavery forces in the years prior to and during the Civil War. Since Congress took a number of steps to protect the enforcement of federal laws in other sections of the 1871 Civil Rights Act and in other contemporaneous civil rights laws, it cannot reasonably be claimed that Supremacy claims are excluded from section 1983.

Second, respondents' contention that the Texas regulations violate the Social Security Act may also be brought under that portion of section 1983 which provides a cause of action to redress violations under color of state law of "rights secured by the . . . laws" of the United States. This language was added to the statute in the Revised Statutes adopted by Congress in 1875 and is therefore positive law. This Court has previously made clear that it applies to all federal statutes including the Social Security Act.

Unlike where Constitutional claims are involved, 28 U.S.C. § 1343(3) does not on its face parallel section 1983.

Rather, section 1343(3) provides federal court jurisdiction over actions authorized by law to redress violations of rights secured by the Constitution or by "any Act of Congress providing for equal rights." However, the history of the two sections makes clear that they were intended to be complementary and that section 1983 is itself an Act of Congress providing for equal rights. Hence, jurisdiction over section 1983 statutory claims also exists under section 1343(3).

Third, the district court had jurisdiction over both the Supremacy and statutory claims brought under section 1983 under 28 U.S.C. § 1343(4), which provides jurisdiction for any action authorized by law under "any Act of Congress providing for the protection of civil rights." This Court has made clear that the purpose of section 1983 is to *protect* federally created rights by providing a cause of action in federal court for their enforcement and that the rights protected by section 1983 are *civil rights. Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968), held that claims under 42 U.S.C. § 1982 may be brought under section 1343 (4). Since section 1983 was modeled after the criminal analogue to section 1982, and section 1983 was intended to protect many of the civil rights covered by section 1982, the two statutes should be treated alike for purposes of jurisdiction under section 1343(4).

It is true that, unlike section 1982, section 1983 does not define for itself the substantive rights that fall within its protection. But this is irrelevant, since section 1343(4) applies to Acts that *protect* civil rights, not to Acts that *create* rights. Furthermore, other provisions of the Civil Rights Act of 1957 demonstrate that Congress was unconcerned with the distinction between laws that create rights

and laws that protect civil rights created by the Constitution and other federal laws. In addition, it is consistent with the purpose of the 1957 Civil Rights Act to construe section 1343(4) as curing any possible limitations on civil rights jurisdiction under section 1343(3).

Finally, strong policy arguments support the construction of sections 1343(3) and (4) urged by respondents. The issues in this and similar welfare cases are especially suited for decision by the federal courts. They often involve social policies to which state courts may be hostile, and the federal statutory scheme is often extremely complex. Moreover, the determination of the proper allocation of federal aid in the welfare area is especially suited for the federal courts.

If federal courts cannot hear federal welfare claims, there may be no forum at all for their vindication. Some states prohibit any review of welfare department actions, while others so encumber such review or limit the available relief as to make redress virtually unavailable. Finally, respondents' position here would not add significantly to the caseload of the federal courts and would save considerable time now spent on deciding needlessly complex jurisdictional issues in cases where the underlying federal statutory claims are clear.

II.

On the merits, respondents claim that Texas has reduced its AFDC needs standards in violation of section 402(a)(23) of the Social Security Act, 42 U.S.C. §602(a)(23), under which Congress has provided that states must have increased their AFDC needs standards by July 1, 1969, to reflect fully changes in costs until that time. This Court has held that states may not thereafter reduce their standards below that 1969 level. States may consolidate their standards by averaging prior standards, however, provided that the new standards give full recognition to all components of the prior standards and do not obscure the extent to which actual benefits in the state fail to meet the needs recognized in the state's 1969 levels. *Rosado* v. *Wyman, supra.*

Texas has engaged in such a consolidation of its 1969 standards. Among the 1969 standards which Texas averaged to obtain the consolidated standard were shelter and utilities allowances that had been unlawfully reduced by "prorating," that is, by improperly assuming that nonrecipients living with the family were contributing to the family, in violation of the Social Security Act and federal regulations. *Van Lare* v. *Hurley, supra.* Since such standards had been reduced in violation of the Social Security Act and did not accurately reflect the needs of the families involved, their inclusion in the average resulted in lower standards for all recipients, thereby obscuring the extent to which Texas continues to fall short of meeting its 1969 needs standards. The Texas standards should therefore be increased to reflect the full lawful 1969 needs standards.

ARGUMENT

I. The District Court had jurisdiction over this action without regard to the amount in controversy under 28 U.S.C. §§ 1343(3) and 1343(4).

Respondents in this case challenge statewide welfare regulations issued by the Texas Department of Human Resources on the ground that the regulations conflict with federal requirements contained in the Social Security Act. The case involves important issues of federal welfare policy as well as the proper allocation of millions of dollars of federal aid. The jurisdictional question presented here, and in *Gonzalez* v. *Young,* No. 77-5324 (1977 Term), is whether challenges to state welfare rules that conflict with federal law may be heard by the federal courts or whether they must be decided, if at all, in the state courts.

Respondents submit that the district court had jurisdiction under three separate heads of federal jurisdiction. First, this action was authorized by 42 U.S.C. § 1983 since respondents seek to enforce rights secured by the Supremacy Clause of the United States Constitution. Jurisdiction therefore existed over these Supremacy claims under 28 U.S.C. § 1343(3). Second, apart from the Supremacy Clause, section 1983 authorizes actions to redress the violation of all federal "laws", including the Social Security Act. Since section 1983 is an "Act of Congress providing for equal rights" within the meaning of section 1343(3) such statutory actions may also be brought under that provision. Third, respondents' Supremacy and statutory claims under section 1983 may be brought under 28 U.S.C. § 1343(4) because section 1983 is an "Act of Congress providing for

the protection of civil rights" within the meaning of that statute.

A. *This Action Is Authorized by 42 U.S.C. §1983 Since Respondents Seek to Enforce Rights Secured by the Supremacy Clause of the United States Constitution; Jurisdiction Over This Action Therefore Exists Under 28 U.S.C. §1343(3).*[10]

Since its enactment in 1871, section 1983 has provided a cause of action to redress violations of all "rights, privileges, and immunities secured by the Constitution." Civil Rights Act of 1871, Act of April 20, 1871, ch. 22, 17 Stat. 13. It is firmly established that challenges to state welfare rules on the ground that they conflict with the Social Security Act rest on the Supremacy Clause of the Constitution. U.S. Const. art. VI, cl. 2. *Hagans* v. *Lavine,* 415 U.S. 528, 533 n. 5, 550, 552-53 (1974); *Carleson* v. *Remillard,* 406 U.S. 598, 601 (1972); *Townsend* v. *Swank,* 404 U.S. 282, 286 (1971). Since Supremacy claims are "basically constitutional in nature," *Douglas* v. *Seacoast Products, Inc.,* 431 U.S. 265, 272 (1977), federal statutory rights guaranteed by the Supremacy Clause are "secured by" the Constitution within the meaning of section 1983, and jurisdiction over such Supremacy claims exists under 28 U.S.C. § 1343(3).[11]

[10] The Petition for Writ of Certiorari raised only the issue of whether 28 U.S.C. § 1343(4) confers subject matter jurisdiction over respondents' claims. Respondents' Opposition to Petition for Writ of Certiorari, however, asserted that 28 U.S.C. § 1343(3) also provides subject matter jurisdiction in this case. Consequently, this argument is properly before the Court. *Story Parchment Co.* v. *Paterson Parchment Co.,* 282 U.S. 555, 560 (1931); *Langnes* v. *Green,* 282 U.S. 531, 535-39 (1931); *United States* v. *American Railway Express Co.,* 265 U.S. 425, 535-36 (1924). *Compare Wiener* v. *United States,* 359 U.S. 349, 351 n. (1958).

[11] 28 U.S.C. § 1343(3) provides original jurisdiction in federal district court for any civil action "authorized by law . . . [t]o redress the deprivation, under color of any State law . . . of any right, privilege or immunity secured by the Constitution of the United States. . . ." Since the language of both statutes is the same, and both originated in section 1 of the 1871 Civil Rights Act, jurisdiction exists under section 1343(3) for any action authorized by section 1983 to redress Constitutional rights. *Aldinger* v. *Howard,* 427 U.S. 1, 17 (1976); *Lynch* v. *Household Finance Corp.,* 405 U.S. 538, 543 n. 7 (1972).

The language of section 1983 is unambiguous and admits of no exception. Like the virtually identical language in 18 U.S.C. § 241,[12] it "embraces *all* of the rights and privileges secured to citizens by *all* of the Constitution. . . ." *United States* v. *Price,* 383 U.S. 787, 800 (1966), (emphasis in original); *see also, United States* v. *Guest,* 383 U.S. 745, 753 (1966); *United States* v. *Classic,* 313 U.S. 299, 321-22 (1941).[13] This Court has previously rejected any effort to

[12] Section 241 provides:

> If two or more persons conspire to injure, oppress, threaten, or intimidate any citizen in the free exercise or enjoyment of any right or privilege secured to him by the Constitution or laws of the United States, or because of his having so exercised the same . . . they shall be fined not more than $5000 or imprisoned not more than ten years, or both.

[13] Although section 1983 is most often relied on to vindicate rights under the Fourteenth Amendment, it is not limited to such rights. *Bailey* v. *Patterson,* 369 U.S. 31 (1962); *Smith* v. *Allwright,* 321 U.S. 649 (1944); *cf. Carter* v. *Greenhow,* 114 U.S. 317 (1884). In *Bailey,* the Court upheld an action under section 1983 to enforce the right guaranteed by the Commerce Clause to non-segregated service in interstate and intrastate transportation. 369 U.S. at 32-33. *See Morgan* v. *Virginia,* 328 U.S. 373 (1946). In *Smith* v. *Allwright,* the Court upheld an action under section 1983 to redress violations of the Fifteenth Amendment. *See also, Cobb* v. *City of Malden,* 202 F.2d 701 (1st Cir. 1953) (action to enjoin state impairment of contracts); *Valle* v. *Stengle,* 176 F.2d 697 (3d Cir. 1949) (action to redress privileges and immunities guaranteed by U. S. Const. art. IV, § 2, cl. 1); *Raymond Motor Transp., Inc.* v. *Rice,* 417 F. Supp. 1352, 1354 (W.D. Wis. 1976) (action to enjoin state trucking laws in violation of Commerce Clause); *Moity* v. *Louisiana State Bar Assn.,* 414 F. Supp. 176 (E.D. La.) (three

"pare down" the scope of the Constitutional rights and privileges that fall within its protection. *Lynch* v. *Household Finance Corp., supra,* 405 U.S. at 549.

Section 1983 was one of the five civil rights bills enacted by the Reconstruction Congress. One of the major goals of that body of legislation and the Constitutional Amendments on which it was based was to establish the federal government as the primary guarantor of basic federal rights. *Mitchum* v. *Foster,* 407 U.S. 225, 239 (1972). To this end, it was essential to reaffirm the primacy of federal law established in the original Constitution by the Supremacy Clause, but seriously weakened in the years prior to the Civil War.[14] Commager, *Historical Background of the Fourteenth Amendment,* in The Fourteenth Amendment 25-27 (B. Schwartz ed. 1970).

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judge court), *dismissed on remand,* 414 F. Supp. 180 (E.D. La.), *aff'd,* 537 F.2d 1141 (5th Cir. 1976) (action to enjoin ex post facto law).

18 U.S.C. §§ 241-242, which provide criminal penalties for the violation of Constitutional rights, have also been construed to apply to non-Fourteenth Amendment rights. *United States* v. *Guest, supra,* 383 U.S. at 759 n. 17 (right to travel not encompassed within the Fourteenth Amendment); *United States* v. *Classic, supra* (right to vote protected by U. S. Const. art. I, § 2).

Although *Carter* v. *Greenhow, supra,* appears to hold that rights secured by the impairment of contract clause are not protected by section 1983, the decision rests upon the now discredited distinction between property and personal rights. *See Lynch* v. *Household Finance Corp., supra,* 405 U.S. at 542 n. 6.

[14] During that period, pro-slavery forces had argued that the states remained "sovereign" after the ratification of the Constitution, and that they could consequently nullify actions of the national government which they believed to be unconstitutional. *E.g.* Calhoun, *A Discourse on the Constitution and Government of the United States,* in 1 The Works of John C. Calhoun (1888); *see also,* W. Bennett, *American Theories of Federalism* 100-59 (1964); 1 Mogi, The Problem of Federalism 105-17 (1931).

A major purpose of the Fourteenth Amendment[15] and the civil rights laws passed to enforce it was to affirm the Supremacy of federal law. Thus, in one of the first cases construing the Fourteenth Amendment, this Court made clear that as a result of the Amendment no state could "deny to the general government the right to exercise all of its granted powers, though they may interfere with the full enjoyment of rights she would have if those powers had not been thus granted." *Ex Parte Virginia,* 100 U.S. 339, 346 (1880). And in the *Slaughter-House Cases,* 16 Wall. 36 (1872), the Court held that the privileges and immunities clause of the Fourteenth Amendment protected from state interference the basic rights of national citizenship "which owe their existence to the Federal government, its national character, its Constitution, or its laws."[16] 16 Wall. at 79. As Mr. Justice Jackson wrote concurring in *Edwards* v.

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[15] The first version of the Fourteenth Amendment introduced in the Thirty-Ninth Congress provided: "All national and state laws shall be equally applicable to every citizen and no discrimination shall be made on account of race or color." Flack, *Adoption of the Fourteenth Amendment* 56 (1908).

[16] In his majority opinion in the *Slaughter-House Cases,* Mr. Justice Miller held that the privileges and immunities protected from state interference by the Fourteenth Amendment include a citizen's right "to come to the seat of government to assert any claim he may have upon that government, to transact any business he may have with it, to seek its protection, to share its offices, to engage in administering its functions." 16 Wall. at 79. Subsequent cases have recognized that the privileges and immunities protected by the Amendment derive from the right of the national government to legislate without interference in all areas granted to it under the Constitution. Thus, *United States* v. *Cruikshank,* 92 U.S. 542 (1875), held that the right to petition the federal government for redress of grievances is a privilege of national citizenship, and *In Re Quarles,* 158 U.S. 532 (1895), held the right to inform the government about violations of its statutes to be similarly protected. In his opinion in *Hague* v. *C.I.O.,* 307 U.S. 496, 513 (1939), Mr. Justice Roberts included as a protected privilege the right to assemble "to discuss national

California, 314 U.S. 160, 182 (1941), "[t]his clause was adopted to make United States citizenship the dominant and permanent allegiance among us."

The Civil Rights Act of 1871, which was enacted to enforce the provisions of the Fourteenth Amendment, 17 Stat. 13, similarly was intended to protect the Supremacy of federal law.[17] Thus, the message from President Grant to Congress on March 23, 1871, which led to the passage of the

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legislation and the benefits, advantages and opportunities to accrue to citizens therefrom."

In his dissenting opinion in the *Slaughter-House Cases*, Mr. Justice Field specifically noted the overlap between the privileges and immunities clause, as construed by the majority, and the Supremacy Clause: "With privileges and immunities thus designated no state could ever have interfered by its laws. . . . The supremacy of the Constitution and the laws of the United States always controlled any state legislation of that character." 16 Wall. at 96.

[17] One of Congress' major concerns during the post-Civil War period was interference with the operations of the Freedman's Bureau. The First Freedman's Act, adopted in 1865, had provided *inter alia* for the issuance of "such provisions, clothing and fuel, as [are] needful for the immediate and temporary shelter and supply of destitute and suffering refugees and freedmen and their wives and children." Act of March 3, 1865, ch. 90, 13 Stat. 508. The Act also authorized the setting aside and granting of land to each refugee or freedman. *Id.* The Second Act, adopted in 1866, continued the Bureau for two additional years and extended its supervision and care "to all loyal refugees and freedmen, so far as the same shall be necessary to enable them as speedily as practicable to become self-supporting citizens of the United States. . . ." Act of July 16, 1866, ch. 200, 14 Stat. 174. The life of the Bureau was extended again in 1868 and its activities finally came to an end in the summer of 1872. Konvitz, *A Century of Civil Rights* 43-47 (1961).

In its report supporting adoption of the Fourteenth Amendment, the Joint Committee on Reconstruction cited the fact that the Bureau "is almost universally opposed by the mass of the population, and exists in an efficient condition only under military protection." Report of the Joint Committee on Reconstruction reprinted in Schwartz, *Statutory History of the United States: Civil Rights*, pt. 1, pp. 285, 288 (1970). The Civil Rights Act of 1866 had provided removal jurisdiction in the federal courts to

Act, urged legislation to secure "the enforcement of law in all parts of the United States." *Monroe* v. *Pape*, 365 U.S. 167, 172-73 (1961). To this end, section 2 of the Act expressly prohibited conspiracies "to prevent, hinder, or delay the execution of any law of the United States," and to interfere with federal officers in the discharge of their duties. 17 Stat. 13. Section 3 authorized the President to take necessary measures, including use of the military, to resist violence, conspiracies or insurrection that obstructed or hindered the execution of federal laws. 17 Stat. 14.

Finally, section 6 of the Civil Rights Act of 1870, Act of May 31, 1870, ch. 114, 16 Stat. 140, now 18 U.S.C. § 241, prohibited conspiracies "to injure, oppress, threaten, or intimidate any citizen with intent to prevent or hinder his free exercise and enjoyment of any right, or privilege granted or secured to him by the Constitution or laws of the United States." 16 Stat. 141. This Court very early held that section 6 protects the right to settle on public lands established by the Homestead Acts. *United States* v. *Waddell*, 112 U.S. 76 (1884).

In light of the overall purpose of the Reconstruction legislation to establish the federal government as the primary guarantor of federal rights, and the protection of rights under federal laws afforded in other sections of the 1871 Act and in the 1870 and 1866 Acts, it is clear that Supremacy claims must have been included under section 1983. The states[18] nevertheless advance three arguments to support such an exclusion.

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protect federal officers and other individuals from actions taken pursuant to the Freedmen's Bureau Act. Act of April 9, 1866, ch. 31, 14 Stat. 27.

[18] Because the jurisdictional issues are the same in both cases, respondents address the arguments against jurisdiction raised by

First, the states argue that a case is constitutionally-based for purposes of section 1983 only when a correct decision depends upon a construction of the Constitution, which is said not to be the case here. The cases offered by the states to support this argument, however, all involved whether a claim *arises under* federal law for purposes of establishing the power of a federal court to decide a case under Article III, § 2 of the Constitution and 28 U.S.C. § 1331,[19] which power surely exists here. Those cases have no relevance to the wholly different question of whether a right is *secured by* the Constitution so as to state a claim for relief under section 1983. *Cf. Bell* v. *Hood*, 327 U.S. 678 (1946).

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the Texas petitioners in this case and the New Jersey respondents in *Gonzales* v. *Young, supra*, No. 77-5324. For convenience, the arguments of both groups of state officials are referred to in Part I of this brief as the arguments of "the states."

[19] 28 U.S.C. § 1331(a) provides:

> The district courts shall have original jurisdiction of all civil actions wherein the matter in controversy exceeds the sum or value of $10,000, exclusive of interest and costs, and arises under the Constitution, laws, or treaties of the United States. . . .

Even as a test for determining federal question jurisdiction, the states' formulation is inaccurate. The fact that application of federal law is not contested in a particular case does not defeat federal jurisdiction. Thus, federal jurisdiction exists where the defendant defaults and controverts nothing, *The Fair* v. *Kohler Die and Specialty Co.*, 228 U.S. 22 (1913), or where the only questions are factual and no issue exists regarding the federal law. *Peyton* v. *Railway Express Agency, Inc.*, 316 U.S. 350, 352-353 (1942); 1 Moore's Federal Practice ¶ 0.62 [2.-2] at 664 (2d ed. 1977). Conversely, the fact that a federal question may be raised in defense of an action does not necessarily mean that federal jurisdiction exists. *Phillips Petroleum Co.* v. *Texaco*, 415 U.S. 125 (1974); *Louisville & Nashville R.R.* v. *Motley*, 211 U.S. 149 (1908).

More importantly, at the heart of every Supremacy case is the question of whether the degree of conflict between federal and state laws violates the Constitution. As this Court stated in *Perez* v. *Campbell*, 402 U.S. 637 (1971):

> Deciding whether a state statute is in conflict with a federal statute and hence invalid under the Supremacy Clause is essentially a two-step process of first ascertaining the construction of the two statutes and then determining the *constitutional question* of whether they are in conflict.

402 U.S. at 644 (emphasis added). Even where, as here, the conflict is obvious, the Supremacy question is still Constitutional in nature.

Second, the states assert that the Supremacy Clause merely states a fundamental structural principle of federalism, rather than securing individual rights that may be protected by section 1983. In their view, the individual rights asserted in Supremacy cases are *secured by* the underlying federal statutes and not by the Constitution itself. This argument stretches the statutory language beyond recognition. As Mr. Justice Brennan wrote in an analogous context, "[a] right is 'secured . . . by the Constitution' . . . if it emanates from the Constitution, if it finds its source in the Constitution." *United States* v. *Guest, supra*, 383 U.S. at 779 (Brennan, J. concurring in part and dissenting in part). Similarly, in *Hague* v. *C.I.O., supra*, Mr. Justice Stone stated that the term "secured by" in 18 U.S.C. § 241 refers to all rights *protected by* the Constitution, not simply to those created by it. 307 U.S. at 526-27.

It is clear that Supremacy claims emanate from and are protected by the Constitution even though they depend in part upon Congressional action.[20] Thus, this Court has held that a federal statutory claim "deriv[es] its force" from the Supremacy Clause, *Douglas* v. *Seacoast Products, Inc.*, *supra*, 431 U.S. at 272, and that the Clause "is the inevitable underpinning for the striking down of a state enactment which is inconsistent with federal law." *Swift and Co.* v. *Wickham*, 383 U.S. 111, 122 n. 18 (1965).

Finally, the states contend that recognition of Supremacy claims under section 1983 is barred by this Court's decision in *Swift and Co.* v. *Wickham, supra*. *Swift* held that cases involving conflicts between state and federal statutes, although Constitutional in nature, do not require the convening of a three-judge district court under 28 U.S.C. § 2281. The Court's holding was based, however, on the specific language and history of section 2281,[21] as well as on "important considerations of judicial administration," 382 U.S.

[20] It is not essential that a person seeking to enforce the Supremacy Clause assert that his express federal rights have been denied by state law. It is enough that the state law interferes with the federal regulatory scheme. *See, e.g., Jones* v. *Rath Packing Co.*, 430 U.S. 519 (1977); *City of Burbank* v. *Lockheed Air Terminal Inc.*, 411 U.S. 624 (1973); *Pennsylvania* v. *Nelson*, 350 U.S. 497 (1956); *Rice* v. *Santa Fe Elevator Corp.*, 331 U.S. 218 (1947). Furthermore, in cases involving express federal statutory rights, it is as fruitless to argue that the right is secured only by the statute as it is to contend that it derives solely from the Constitution. *Cf. Weinberger* v. *Salfi*, 422 U.S. 749 (1975).

[21] Section 2281 was adopted by Congress in reaction to a number of judicial decisions striking down state social legislation under the due process clause of the Fourteenth Amendment. Since Supremacy Clause claims do not present the same opportunity for judicial obstruction of state laws and decisions based on statutes can be overruled by Congress, the Court concluded that there was no need for three-judge courts in such cases. 382 U.S. at 127.

at 128, which counseled against unnecessarily expanding the jurisdiction of three-judge courts. 382 U.S. at 128-29.[22] None of these factors are present here. *See* Part I, section D *infra*. Indeed, as we have shown, coverage of Supremacy claims under section 1983 is fully consistent with the history and remedial purposes of the Act.[23]

B. *This Action Is Also Authorized by 42 U.S.C. §1983 to Enforce Rights Secured by the Social Security Act; Jurisdiction Over Such Claims Exists Under 28 U.S.C. §1343(3) Because Section 1983 Is an Act of Congress Providing for Equal Rights.*

When Congress revised the federal laws in 1875, section 1 of the 1871 Act was rewritten to protect all "rights, privileges and immunities secured by the Constitution *and laws*." Rev. Stat. § 1979 (1875) (emphasis added).[24] In *City of Greenwood* v. *Peacock*, 384 U.S. 808 (1966), the phrase

[22] Three-judge courts interfere with the normal structure and functioning of the lower federal courts by requiring judges who often sit in different parts of a state or region to sit together. 382 U.S. at 268. They also expand the obligatory appellate jurisdiction of the Supreme Court in violation of the principle that ordinarily requires two levels of appellate review. *Id.*

[23] Inclusion of Supremacy claims under section 1983 does not mean that a cause of action exists to enforce every federal statutory right. First, where Congress has expressly provided that no private right of action is intended to enforce a statute, the more specific legislation will prevail over the general right contained in section 1983. *Preiser* v. *Rodriguez*, 411 U.S. 475, 489-90 (1973). Second, not all violations of federal statutes under color of state law involve a claim under the Supremacy Clause. For example, a violation of the federal anti-trust or securities laws by a state in carrying out its own proprietary activities certainly does not involve the Supremacy Clause. The Clause is involved, however, wherever a state law, regulation, policy or course of conduct conflicts with federal law. Whether, in addition, actions by individual state welfare officials in contravention of both state and federal laws depend upon the Supremacy Clause need not be decided here. *Cf. Monroe* v. *Pape, supra*.

"and laws" in Rev. Stat. § 1979 was construed by this Court to include not only "civil equal rights laws," but "other federal . . . statutory rights as well."[24a] 384 U.S. at 829-30. And, in *Monell* v. *New York City Dep't of Social Services*, 46 U.S.L.W. 4569, 4581 (U.S. June 6, 1978), this Court stated, "there can be no doubt that § 1 of the Civil Rights Act [of 1871] was intended to provide a remedy, to be broadly construed, against all forms of official violation of federally protected rights." Therefore, apart from the Supremacy Clause, rights created by the Social Security Act are protected by section 1983.[25] *See Edelman* v. *Jordan*,

[24] Since the Revised Statutes were enacted as positive law, Revision of Statutes Act of 1874, ch. 333, § 2, 18 Stat. 113 (1875), the addition of "and laws" to the statute cannot be ignored because it was added by the Revisors. *See Examining Board of Engineers, Architects & Surveyors* v. *De Otero*, 426 U.S. 572 (1976); *United States* v. *Bowen*, 100 U.S. 508, 513 (1879). *Cf. Wynn* v. *Indiana State Dep't. of Public Welfare*, 316 F. Supp. 324 (N.D. Ind. 1970).

[24a] *Holt* v. *Indiana Manufacturing Co.*, 176 U.S. 68 (1900) is not to the contrary. There, the plaintiff sought to enjoin the collection of state taxes assessed against the company's tangible property, including its patent rights, on the ground that the Constitution and federal patent laws prohibited the taxes. The district court dismissed the action, and this Court affirmed, stating simply that sections 1983 and 1343(3) "refer to civil rights only and are inapplicable here." 176 U.S. at 72.

As this Court noted in *Lynch* v. *Household Finance Co.*, *supra*, *Holt* is best understood as falling under the special judicial policies that generally limit federal court interference with state tax laws. 405 U.S. at 542 n. 6. Moreover, since the claims in *Holt* were both statutory and Constitutional, the decision must have been based not on the inapplicability of section 1983 to statutory claims, but on the fact that only economic rights were involved, a limitation on section 1983 that this Court subsequently rejected in *Lynch*. 405 U.S. at 538.

[25] Although in this case the result of this statutory theory is the same as under the Supremacy theory discussed in section A *supra*, the argument made here is broader than the Supremacy theory. This is because not all violations of federal statutes by persons acting under color of state law involve the supremacy of federal over state law; but all such violations would be covered by the

415 U.S. 651, 675 (1974) ("It is, of course, true that . . . suits in federal court under section 1983 are proper to secure compliance with the provisions of the Social Security Act on the part of participating States"); *see also*, 415 U.S. at 679, 690-91 (Douglas, J. and Marshall, J. dissenting). It remains only to show that jurisdiction over statutory claims brought under section 1983 exists under 28 U.S.C. § 1343(3).

Section 1 of the Civil Rights Act of 1871 provided concurrent jurisdiction in both the federal district and circuit courts for all civil actions arising under its substantive provisions.[26] When the substantive and jurisdictional provisions were divided by the Revisors in 1875, district court jurisdiction continued to parallel the substantive provision, including coverage of rights secured by all laws of the United States. Rev. Stat. § 563(12).[27] Circuit court juris-

"and laws" language of the statute. For this reason, addition of the "and laws" language by the Revisors in 1875 was not redundant with the pre-existing coverage of Supremacy claims under the original 1871 Act.

[26] Section 1 of the 1871 Act provided:

> Any person, who, under color of any law, statute, ordinance, regulation, custom, or usage of any State, shall subject, or cause to be subjected, any person within the jurisdiction of the United States to the deprivation of any rights, privileges, or immunities secured by the Constitution of the United States, shall . . . be liable to the party injured in any action at law, suit in equity, or other proceeding . . . to be prosecuted in the several district or circuit courts . . . under the provisions of the act of the ninth of April, eighteen hundred and sixty-six . . .

17 Stat. 13.

[27] Section 563(12) provided:

> The district courts shall have jurisdiction as follows . . . Twelfth. Of all suits at law or in equity authorized by law to be brought by any person to redress the deprivation, under

diction, however, was limited to actions to redress the violation of Constitutional rights or rights secured by "any law providing for equal rights." Rev. Stat. § 629(16).[28] Finally, when the Judicial Code was revised again in 1911, the circuit court language in section 629(16), rather than the district court language in section 563(12), was used in the single district court jurisdictional provision, now 28 U.S.C. § 1343(3), that was enacted. Act of March 3, 1911, ch. 231, 36 Stat. 1087.[28a]

Nothing in this history suggests that, despite the difference in language, section 1343(3) is more narrow in

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color of any law . . . of any State, of any right, privilege, or immunity secured by the Constitution of the United States or of any right secured by any law of the United States to persons within the jurisdiction thereof.

[28] Section 629(16) provided:

The circuit courts shall have original jurisdiction as follows . . . Sixteenth. Of all suits authorized by law to be brought by any person to redress the deprivation under color of law . . . of any State, of any right, privilege, or immunity, secured by the Constitution of the United States or of any right secured by any law providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States.

[28a] Original federal question jurisdiction was given the federal courts in 1875, Act of March 3, 1875, 18 Stat. 470, the same year in which the predecessor of section 1983 was enlarged to include state deprivations of federal statutory rights. In *Lynch* v. *Household Finance Corp., supra,* the Court found no indication in the legislative history that the provision of general federal question jurisdiction was intended to narrow the scope of the 1871 Civil Rights Act, particularly noting the simultaneous expansion of section 1983. 405 U.S. at 548 and n.15. The Court further noted that when Congress increased the amount in controversy requirement in 1911 (to $3000), 36 Stat. 1091, "there was no indication that jurisdiction under what is now §1343(3) was to be reduced," and indeed Congress had "explicitly preserved the exemption" for §1343(3)'s predecessor. *Id. See also* S. Rep. No. 388, 61st Cong., 2nd Sess., pt. 1, p. 11 (1910).

scope than section 1983 when federal statutory rights are involved. Rather, for the following reasons, respondents submit that section 1983 is itself an "Act of Congress providing for equal rights," so that any action brought under it falls within the scope of section 1343(3).

First, this Court has made clear that "the reach of the statute conferring jurisdiction [section 1343(3)] should be construed in light of the cause of action [section 1983] as to which federal judicial power *has* been extended by Congress." *Aldinger* v. *Howard, supra,* 427 U.S. at 17 (emphasis in original). *See also, Examining Board of Engineers, Architects & Surveyors* v. *De Otero, supra.* Prior to the 1875 Revision, Congress had provided federal jurisdiction for all actions under section 1983. *See* note 26 *supra.* Furthermore, the same jurisdiction existed concurrently in both the district and circuit courts. *Id.* Without clear contrary evidence in the legislative history, the jurisdictional provisions enacted by the Revisors should not be interpreted to alter this scheme. Rather, Rev. Stat. § 629(16) should be interpreted as having continued to provide the same civil rights jurisdiction for the circuit courts as Rev. Stat. § 563(12) provided for the district courts—that is, jurisdiction over actions to redress violations of the Constitution and *all* laws.

Second, the legislative history supports the view that Rev. Stat. §§ 629(16) and 563(12) were both intended to provide jurisdiction over all claims brought under section 1983. Thus, the Revisors' marginal notes to both sections described them identically as pertaining to "suits to redress deprivation of rights secured by the Constitution and laws," and both provisions were cross-referenced by the Revisors to sections 1977 and 1979 of the Revised

Statutes (now 42 U.S.C. §§ 1981 and 1983). Rev. Stat. §§ 563(12), 629(16). Similarly, Revised Statutes § 1979 (now 42 U.S.C. § 1983) was cross-referenced to *both* jurisdictional provisions. *Id.*

This view is confirmed by the following explanatory note concerning § 629(16) that appeared in an early draft of the Revised Statutes:

> It may have been the intention of Congress to provide by this enactment [referring to section 1 of the 1871 Act], for all the cases of deprivations mentioned in the previous act of 1870, and thus actually to supersede the indefinite provision contained in that act. But as it might perhaps be held that only such rights as are specifically secured by the Constitution and not every right secured by a law authorized by the Constitution were here [referring to section 629(16)] intended, it is deemed safer to add a reference to the civil rights act.

1 Revision of U.S. Statutes, Title 13, p. 64 (1872). This note makes clear that the phrase "any law providing for equal rights" in § 629(16) was intended as a shorthand reference for the revised version of section 1 of the 1871 Civil Rights Act. Rev. Stat. § 1979. This is true because, with the addition of "and laws," *see* p. 25, *supra*, Rev. Stat. § 1979 was the only "civil rights act" that provided a civil action to redress violations of "every right secured by a law authorized by the Constitution," and because, as the passage demonstrates the Revisors regarded the 1871 Act as having superseded earlier civil rights laws.

Third, the origin of the 1871 Act as an Act to enforce the Fourteenth Amendment strongly suggests that it is

an "Act . . . providing for equal rights," even where it embraces rights created by statutes that do not speak specifically in terms of equality.[29] It was "the failure of certain states to enforce the laws with an equal hand that furnished the powerful momentum behind [the 1871 Act]." *Monroe* v. *Pape, supra*, 365 U.S. at 174-75.

Finally, the legislative history of the 1911 revision indicates that Congress intended to merge into a single section, now codified as 28 U.S.C. § 1343(3), the jurisdiction previously divided between the circuit and district courts:

> This paragraph merges the jurisdiction now vested in the district courts by paragraph 12 of section 563, and in the circuit courts by paragraph 16 of section 629, and vests it in the district courts.

S. Rep. No. 388, 61st Cong., 2d Sess., pt. 1 at 15 (1910). Therefore, assuming *arguendo* that section 629(16) did not originally provide jurisdiction over all cases arising under section 1983, it is clear that section 563(12) did provide jurisdiction over all 1983 claims,[30] and this jurisdiction was merged into present section 1343(3).

The states do not attempt to argue that section 1343(3) is more narrow than section 1983. Instead, they contend that section 1983 as amended by the Revisors was never

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[29] Congress could well have determined that in order to guarantee equality of opportunity and secure equal treatment for all persons as intended by the Fourteenth Amendment it was necessary to provide a right of action in federal court to enforce both constitutional and statutory rights. *Cf. Katzenbach* v. *Morgan*, 384 U.S. 641 (1966).

[30] Any other conclusion would ignore the Revisors' reference to Rev. Stat. § 1979, and would mean there was no jurisdictional counterpart for section 1983 in the Revised Statutes.

intended to apply to laws other than civil rights laws that speak in terms of racial equality, and that both section 1983 and section 1343(3) should be so limited. The only possible support for this argument is the decision in *Georgia* v. *Rachel,* 384 U.S. 780 (1960), which is clearly distinguishable.

In *Rachel,* this Court construed the phrase "law providing for equal civil rights" in the civil rights removal statute, 28 U.S.C. § 1443(1), to mean any law "providing for specific civil rights stated in terms of racial equality," but not including section 1983. 384 U.S. at 792. Section 1443(1) was derived from section 3 of the Civil Rights Act of 1866, 14 Stat. 27, which provided for removal only in cases involving the express rights of racial equality guaranteed in section 1 of that Act. 384 U.S. at 790. The 1866 Act was adopted to enforce the Thirteenth Amendment and was focused entirely on removing the badges of slavery outlawed by that Amendment. *See Jones* v. *Alfred H. Mayer Co.,* 392 U.S. 409, 439-40 (1968). These origins strongly suggested that removal should not be available where nonracial rights were at stake. 384 U.S. at 789-92.

Since the 1871 Act contained no authorization for removal jurisdiction, the Court in *Rachel* reasoned that the Revisors could not have intended the phrase "equal civil rights" in section 1443(1) to create removal jurisdiction in cases protected by section 1983. 384 U.S. at 790. In addition, there were strong policy reasons for construing section 1443(1) narrowly.[31]

[31] Because removal divests state courts of jurisdiction to act in a particular case, it eliminates the role of the state courts as partners in enforcing constitutional rights. In addition, since removal applies to criminal as well as civil cases, section 1443(1) runs counter to the general policy against federal judicial interference in state criminal administration. *See, e.g., Douglas* v. *City of Jeannette,* 319 U.S. 157 (1943); *Younger* v. *Harris,* 401 U.S. 37 (1971). Removal jurisdiction also encourages the unnecessary decision of federal constitutional questions, where cases could be resolved in the state courts on state law grounds, and it involves the federal courts in issues of state law that are incidental to the state court action.

In contrast to section 1443(1), section 1983 involves no interference with state criminal administration. Furthermore, the state courts have never been regarded as having an important role in the development of federal statutory programs such as those under the Social Security Act. There are, therefore, no reasons such as there were in *Rachel,* to construe the language of section 1343(3) narrowly.

None of these factors are present here. Section 1983 clearly reaches deprivations of Constitutional rights other than those cast in racial terms. *Monroe* v. *Pape, supra,* 365 U.S. at 80-83, and there is no evidence that Congress meant to limit the statutory rights covered by the Act more narrowly than the Constitutional rights that are covered. If Congress had intended section 1983 to provide a remedy only for laws that speak in racial terms, it is not likely that it would have used the broad term "laws". As the explanatory note quoted earlier demonstrates, the Revisors interpreted Rev. Stat. § 1979 as applying to all laws authorized by the Constitution which is far more consistent with the statutory language than the states' construction. Finally, as we discuss in Part I, section D *infra,* there are strong policy reasons for construing the language of section 1343 (3) broadly.

In sum, claims under the Social Security Act are secured by the "laws" of the United States so as to give rise to a cause of action under section 1983. Jurisdiction over such 1983 claims exists under section 1343(3), since the history of section 1983 and section 1343(3) makes clear that it is an Act of Congress providing for equal rights.

C. *Jurisdiction Over Respondents' Social Security Act Claims Also Exists Under 28 U.S.C. § 1343(4).*

The Court of Appeals in this case found jurisdiction over respondents' claims under 28 U.S.C. § 1343(4), which provides jurisdiction in the district courts over any civil action authorized by law "to recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote." App. to Petition for Writ of Certiorari, B-30. In sections A and B of this Part, respondents have shown that their rights under the Social Security Act may be protected by an action brought under section 1983. In this section, we show that the Court of Appeals correctly found that section 1983 is an Act of Congress providing for the protection of civil rights within the meaning of section 1343(4).

There can be no question that section 1983 *protects* federally created constitutional and statutory rights by providing civil remedies for their deprivation at the hands of state and local officials:

> [The] legislative history [of section 1983] makes evident that Congress clearly conceived that it was altering the relationship between the States and the Nation with respect to the *protection* of federally created rights; it was concerned that state instrumentalities could not *protect* those rights; it realized that state officers might, in fact, be antipathetic to the *vindication* of those rights; and it believed that these failings extended to the state courts.

Mitchum v. *Foster, supra,* 407 U.S. at 242 (emphasis supplied). Furthermore, the rights protected by section 1983 are "civil rights." In *Moor* v. *County of Alameda,* 411 U.S.

693 (1973), this Court noted that section 1983 is one of the "various acts . . . which do create federal causes of action for the violation of federal civil rights." 411 U.S. at 702. In *Robertson* v. *Wegmann,* 46 U.S.L.W. 4555, 4557 (May 31, 1978), the Court referred to section 1983 as "one of the 'Reconstruction civil rights statutes,'"[31a] and in *Monell* v. *New York City Dept. of Social Services, supra,* 46 U.S.L.W. at 4576-77, the Court stated that the legislative history makes clear that section 1983 was "intended to give a broad remedy for violations of federally protected rights."

In *Jones* v. *Alfred H. Mayer Co., supra,* this Court held that jurisdiction exists under section 1343(4) to decide a case arising under 42 U.S.C. § 1982 without regard to the amount in controversy. 302 U.S. at 412 n. 1. As has been noted previously, section 1983 was enacted to enforce the Fourteenth Amendment, which in turn was intended *inter alia* to make permanent the civil rights previously protected in section 1982 and the other portions of the Civil Rights Act of 1866, *Lynch* v. *Household Finance Corp., supra,* 405 U.S. at 544-45; *Shelley* v. *Kraemer,* 334 U.S. 1, 10-11 (1948). Furthermore, section 1983 was expressly modeled after section 2 of the 1866 Act, *Mitchum* v. *Foster, supra,* 407 U.S. at 239; *Lynch* v. *Household Finance Corp. supra,* 405 U.S. at 545 n. 2; *Monroe* v. *Pape, supra,* 365 U.S. at 185, which provided criminal penalties for violating the civil rights protected in section 1 of that Act (now section 1982). Although section 1983 is much broader than section 1982, particularly as it protects non-racial rights, the two

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[31a] Petitioners suggest that there is no basis for federal jurisdiction since the Fifth Circuit's decision rested on a federal regulation, 45 C.F.R. §233.90(a), rather than a federal statute. Petitioners' Brief at 12. This argument is frivolous, since the federal regulation clearly implements and enforces the requirements of 42 U.S.C. §602(a)(7). *See e.g., Lewis* v. *Martin,* 397 U.S. 552, 555-58 (1970).

statutes thus had common purposes and should not be treated differently under section 1343(4).

It is true, as the states argue, that, unlike section 1982, section 1983 does not define the substantive rights that fall within its protection. But section 1343(4) applies to Acts that *protect* civil rights, not to Acts that *create* rights. Moreover, other provisions of the Civil Rights Act of 1957, Pub. L. No. 85-315, 71 Stat. 634, of which section 1343(4) was a part, demonstrate that Congress in 1957 was unconcerned whether a civil rights law defined its own rights or, instead, protected rights defined by reference to the Constitution and other federal statutes. Thus, the 1957 Act authorized the creation of a Civil Rights Division within the Department of Justice to concentrate on the enforcement of the criminal civil rights statutes, 18 U.S.C. §§ 241-242, which, like section 1983, speak in terms of general Constitutional and statutory rights. Similarly, the bill originally provided a new right of action on behalf of the Attorney General to enforce the rights guaranteed by section 42 U.S.C. §§ 1985(1)-(3).[32] One of those sections, 42 U.S.C.

[32] *Jones* makes clear that section 1343(4) is not merely a technical amendment limited to enforcing substantive rights created in the Civil Rights Act of 1957, as several lower courts have held. *See Gonzalez* v. *Young*, 560 F.2d 160 (3d Cir. 1977), *cert. granted*, 98 S. Ct. 1232 (1978) (No.77-5324); *Andrews* v. *Maher*, 525 F.2d 113 (2d Cir. 1975); *Randall* v. *Goldmark*, 495 F.2d 356 (1st Cir.), *cert. denied*, 419 U.S. 879 (1974). *But see Blue* v. *Craig*, 505 F.2d 830 (4th Cir. 1974); *Gomez* v. *Florida State Employment Service*, 417 F.2d 569 (5th Cir. 1969). Although the House Report described section 1343(4) as providing jurisdiction for a proposed new cause of action by the Attorney General to enforce 42 U.S.C. § 1985, H. Rep. No. 291, 85th Cong., 1st Sess. 9-10 (1957), this could not have been the only purpose of the jurisdictional section. First, the jurisdictional section was retained even after the cause of action was dropped from the bill in the Senate. Second, the section which authorized the new cause of action also contained its own jurisdictional provision. H.R. 6127, 85th Cong., 1st Sess. § 121 (1957). Third, if Congress wanted to limit section 1343(4) to the new public actions under section 1985 it probably would have amended sections 1343(1) and (2), which already provided jurisdiction over private actions under that section.

§ 1985(3) provides a civil right of action, similar to that in section 1983, against persons who conspire to deprive any person or class of persons "of the equal protection of the laws, or of equal privileges and immunities under the laws." *See, Griffin* v. *Breckenridge*, 403 U.S. 88 (1971).

Finally, the overall purpose of the Civil Rights Act of 1957 was "to achieve a more effective enforcement of the rights [already] guaranteed by the Constitution and laws of the United States." H.R. Rep. No. 291, 85th Cong., 1st Sess. 5 (1957). It is consistent with this purpose that section 1343(4) was enacted to eliminate questions that had arisen regarding the scope of jurisdiction under sections 1983 and 1343(3) in the area of both Constitutional rights, see *Hague* v. *C.I.O.*, *supra*, and federal statutory rights. *See, e.g.*, 66 Harv. L. Rev. 1285, 1292-93 (1958); 43 Ill. L. Rev. 105, 107-08 (1948); 47 Colum. L. Rev. 1082, 1083-84 (1947). There is also some evidence that section 1343(4) was originally drafted by the Department of Justice to provide jurisdiction for a proposed new action by the Attorney General to enforce section 1983. Anderson, *Eisenhower, Brownell, and the Congress: The Tangled Origins of the Civil Rights Bill of 1956-57*, 19 (1964). Although the amendment to section 1983 was dropped by the Department before the bill was sent to Congress, *id.* at 20, the jurisdictional section remained in the bill and should be given the scope originally intended for it.

D. *Strong Policy Considerations Support the Conclusion That Section 1343(3)-(4) Provides Federal Jurisdiction for All Federal Supremacy and Statutory Claims Brought Under Section 1983.*

The original purpose of section 1983 and its jurisdictional counterpart was to shift from the state courts to the federal courts principal responsibility for the enforcement of federal rights. It was believed that "by reason of prejudice, passion, neglect, intolerance or otherwise," *Monroe* v. *Pape, supra,* 365 U.S. at 180 (Frankfurter, J., dissenting), federal rights were no longer secure in the state courts and that "a uniquely federal remedy," *Mitchum* v. *Foster, supra,* 407 U.S. at 239, was required.

Although there is no longer the openly hostile climate of the 1860's, state courts still are subject to local pressures that often make them unwilling to enforce federally created rights, *see generally* Neuborne, *The Myth of Parity,* 90 Harv. L. Rev. 1105, 1116 n. 46, 1127-28 (1977), especially where sensitive social policies, such as those embodied in the Social Security Act, are at stake. *See, e.g. Kirkwood* v. *Winstead,* 246 So. 2d 557 (Miss.), *appeal dismissed for want of a substantial federal question,* 404 U.S. 963 (1971). State courts have neither the experience nor resources to interpret properly the complexities of the federal statutory scheme.[33] Finally and most importantly, "[i]t is . . . peculiarly part of the duty of [the federal courts], no less in the welfare field than in other areas of the law, to resolve disputes as to whether federal funds allocated to

[33] As Judge Feinberg recently noted, "[t]he tangle of federal and state statutes and regulations in the welfare area now rivals the Internal Revenue Code and its attendant regulations as a marvel of complexity." *McGraw* v. *Berger,* 537 F.2d 719, 720 (2d Cir. 1976), *cert. denied,* 429 U.S. 1095 (1977).

the States are being expended in consonance with conditions that Congress has attached to their use." *Rosado* v. *Wyman, supra,* 397 U.S. at 423 (1970).

Refusal of this Court to find jurisdiction over federal welfare claims under section 1343(3) or (4) may mean that no remedy exists for their vindication.[34] Several states prohibit any review of welfare decisions in state courts; Ark. Stat. Ann. §83-135 (Repl. 1976); Miss. Code Ann. § 43-29-33 (1973), construed in *Kirkwood* v. *Winstead, supra; Bolin* v. *White,* 51 Ohio App. 2d 92, 367 N.E. 2d 63

[34] Federal jurisdiction may lie under 28 U.S.C. § 1331 where the amount in controversy exceeds $10,000. However, except for the few cases in which the right to future benefits exceeds $10,000, *see, e.g. Weinberger* v. *Wiesenfeld,* 420 U.S. 636, 642 n. 10 (1975), or where the individual claims may be aggregated because they are "common and undivided," *see, e.g. Bass* v. *Rockefeller,* 331 F. Supp. 945, 950 (S.D.N.Y.), *vacated as moot,* 464 F.2d 1300 (2d Cir. 1971), claims such as those at stake here cannot meet the jurisdictional requirement and must be brought, if at all, in state court. *E.g., Gonzalez* v. *Young, supra,* 560 F.2d at 164; *Andrews* v. *Maher, supra,* 525 F.2d at 116; *Randall* v. *Goldmark, supra,* 495 F.2d at 360-61; *Rosado* v. *Wyman,* 414 F.2d 170, 176-77 (2d Cir. 1969), *rev'd on other grounds,* 397 U.S. 397 (1970).

The jurisdictional amount requirement was adopted to ensure that federal courts do not waste their time on the trial of petty controversies. S. Rep. No. 1830, 85th Cong., 2d Sess. 3103 (1958). Challenges to statewide welfare practices that involve millions of dollars manifestly are not petty. Furthermore, the inappropriateness of requiring any amount in controversy where federal rights are in issue has been long and consistently recognized. Wechsler, *Federal Jurisdiction and the Revision of the Judicial Code,* 13 Law & Contemp. Prob. 216, 225 (1948); Friedenthal, *New Limitations on Federal Jurisdiction,* 11 Stan. L. Rev. 213, 217-18 (1959); American Law Institute, *Study of the Division of Jurisdiction between State and Federal Courts,* § 1311(a) and Commentary thereon at 172-76 (Off. Dr. 1969); *Hearings Before the Subcommittee on Courts, Civil Liberties and the Administration of Justice of the House Judiciary Committee,* 95th Cong., 1st Sess. 270 (Oct. 19, 1977) (Statement of Joseph F. Spaniol, Jr. on behalf of the United States Judicial Conference).

(Ct. of App. Frank. Co. 1976); Va. Code § 63.1-119 (Repl. 1973). Even where state court remedies are theoretically available they may nevertheless be so encumbered as to be virtually non-existent. *E.g.*, La. Rev. Stat. Ann. § 46:107 (D) (Supp. 1978), construed in *Hills* v. *Bonin*, 329 So. 2d 773 (La. App.), *applic. for review denied*, 333 So. 2d 237 (La. 1976) (action must be filed within 15 days of mailing fair hearing decision); Ky. Rev. Stat. Ann. § 205.234 (Repl. 1977) (verified petition for review of welfare department decision must be filed within 20 days after decision). Finally, state procedures may make it difficult if not impossible to obtain adequate relief for all persons affected without repeated litigation. *E.g.*, *Jones* v. *Berman*, 37 N.Y. 2d 42, 58, 371 N.Y.S. 2d 422, 432 (1975) (class actions not available in cases against welfare department); *People ex rel. Naughton* v. *Swank*, 58 Ill. 2d 95, 317 N.E. 2d 499 (1974); *Chicago Welfare Rights Org.* v. *Weaver*, 56 Ill. 2d 33, 305 N.E. 2d 140 (1973), *appeal dismissed cert. denied*, 417 U.S. 962 (1974) (each plaintiff must exhaust state administrative remedies even where state law is challenged on Constitutional or federal statutory grounds); *see also Vickers* v. *Trainor*, 546 F.2d 739 (7th Cir. 1976).

Inclusion of federal Supremacy claims under section 1343(3) will not add significantly to the caseload of the federal courts.[35] Jurisdiction already exists over most fed-

[35] In a statement submitted to the House Subcommittee on Courts, Civil Liberties and the Administration of Justice, Professor Charles Alan Wright recently estimated that the number of cases that would be added to the federal dockets by the abolition of the amount in controversy requirement in *all* federal question cases "must [surely] be a very small one." *Hearings*, *supra*, note 34, at 263. The Assistant Director of the Administrative Office of the United States Courts testified on behalf of the Judicial Conference of the United States that the number of cases involving a federal question that are not covered by a specific statutory authorization is so small that they are not separately classified in the statistical system for reporting cases filed in the district courts. *Id.* at 270. He consequently concluded that total elimination of the amount requirement would not have "any appreciable impact on the caseloads of the district courts." *Id.* The number of cases added by the rule urged by respondents in this case would be even smaller than the proposal which Professor Wright and Mr. Spaniol were addressing.

eral statutory claims without regard to the amount in controversy. *Lynch* v. *Household Finance Corp.*, *supra*, 405 U.S. at 549 n. 17; Wright, Miller, & Cooper, Federal Practice and Procedure: Jurisdiction § 3701 (1976). Moreover, coverage of Supremacy claims directly would reduce the time and effort now spent in many welfare and related cases that rely on pendent Constitutional claims. Under this approach experience has shown that considerable judicial resources are often wasted on questions of jurisdiction although the underlying statutory issues are straightforward. *See Andrews* v. *Maher*, *supra*, 525 F.2d at 120; *Aguayo* v. *Richardson*, 473 F.2d 1090, 1098 (2d Cir. 1973), *cert. denied*, 414 U.S. 1146 (1974); *Almenares* v. *Wyman*, 453 F.2d 1075 (2d Cir. 1971), *cert. denied*, 405 U.S. 944 (1972), discussed in Friendly, *Federal Jurisdiction: A General View* 123 (1973).

Finally, the history of Pub. L. No. 94-574, 90 Stat. 2721, which eliminated the amount in controversy requirement for some, but not all, federal question cases does not reflect any Congressional intent to limit jurisdiction over federal welfare claims against state officials.[36] *Cf. Califano*

[36] There is in fact evidence that Congress in 1976 believed that federal statutory claims could be brought under section 1983. The Civil Rights Attorney's Fee Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641, provides for the award of attorney's fees and other

v. *Sanders*, 430 U.S. 99 (1977). As introduced in the Senate, the bill originally removed the amount in controversy requirement in all federal question cases. S. 800, 94th Cong., 1st Sess. § 2 (1976). Although the Senate Judiciary Committee limited the provision to cases involving federal defendants, S. Rep. No. 94-996, 94th Cong., 2d Sess. 14 (1976), the Committee expressly stated, that its action was not intended as a rejection of broader legislation. *Id.* Furthermore, even if Congress had expressly rejected removing the jurisdictional amount requirement in all federal cases, this would not have indicated its attitude regarding the more narrow question presented here of federal jurisdiction in cases against state officials.[37]

In sum, federal Supremacy claims are highly appropriate for resolution in the federal courts, alternative state forums may often be unavailable, and there are no reasons of judicial economy for precluding jurisdiction. The Court

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litigation expenses to the prevailing party in any action brought under section 1983. During the debates on the Attorney's Fees Act which occurred in the Senate shortly after the debate on Pub. L. No. 94-574 and in the House on the same day as the debate on Pub. L. No. 94-574, a number of members of Congress made clear their understanding that section 1983 reaches federal statutory claims. 122 Cong. Rec. S17052-53 (daily ed. Sept. 29, 1976); 122 Cong. Rec. H12159 (daily ed. Oct. 1, 1976).

[37] Legislation to eliminate the amount in controversy requirement in all federal question cases passed the House of Representatives on February 28, 1978, 124 Cong. Rec. H1569-70 (daily ed.); H.R. 9622, 95th Cong., 1st Sess. (1977), and has been introduced in the Senate. S. 2389, 95th Cong., 1st Sess. (1977). Contrary to the states' suggestion, nothing in the House Report for H.R. 9622 indicates that Congress believes that jurisdiction over welfare claims does not or should not exist under sections 1343(3) or (4). Rather, the Report merely recognizes that the question is unsettled. H.R. Rep. No. 95-893, 95th Cong., 2d Sess. 19 (1978).

should therefore hold that federal welfare rights may be enforced in federal courts under section 1983 and sections 1343(3) or 1343(4).

II. Texas may not perpetuate prior unlawfully reduced standards and thereby obscure the extent to which its AFDC program falls short of fulfilling actual need.

Once the Court resolves the jurisdictional issues discussed above, it reaches the relatively easy question on the merits—does section 402(a)(23) of the Social Security Act, 42 U.S.C. §602(a)(23), permit Texas to continue to rely upon AFDC shelter and utilities allowances which have been reduced by means which violate federal law? In section 402(a)(23), added by the Social Security Act Amendments of 1967, 81 Stat. 898, Congress provided, to the extent relevant here, that by July 1, 1969:

> the amounts used by the State to determine the needs of individuals will have been adjusted to reflect fully changes in living costs since such amounts were established . . . . section 402(a)(23).

A primary purpose of the one-time cost-of-living increase in needs standards mandated by section 402(a)(23) was to force each state to disclose the "true extent to which actual assistance falls short of the minimum acceptable." *Rosado* v. *Wyman, supra*, 397 U.S. at 413. As *Rosado* held, each state had to make and maintain this one-time increase in its needs standards. The state could avoid increases in payments or even lower payments by applying a percentage factor to the increased standard, but it could not redefine its standards in such a way that the state was circumnavi-

gating the updating requirement and thereby avoiding "the consequences of increasing the numbers of those eligible and facing up to the failure to allocate sufficient funds to provide for them." *Rosado* v. *Wyman, supra,* 397 U.S. at 413, 415.

In 1969 Texas increased its standards, including its maximum shelter allowances, by an 11% cost-of-living factor in order to comply with section 402(a)(23). Although these standards had been updated, and the validity of that updating is not questioned in this case, some of those standards were unlawful prorated allowances, as we will discuss below. We shall then show that when Texas consolidated its standards in 1973 by averaging together full and prorated allowances, it perpetuated the effect of its previous violations of law and, in doing so, violated section 402(a)(23) by failing to show the extent to which its benefits fall short of its lawful 1969 standards.

A. *The Pre-1973 Texas Prorating Policy Was an Unauthorized Assumption of Income.*

The pre-1973 Texas prorating policy resulted in a reduction in the shelter allowance, and therefore in the AFDC benefit, whenever a non-dependent non-contributing relative lived in the home. Thus, when a penniless relative moved into the house of AFDC recipients, Texas determined that the family would receive less money, even if in fact it had had no increase in income or decrease in shelter costs. This Court has held that such an automatic reduction of the shelter allowance was an assumption that income was available to the family, and that such an assumption contrary to fact violates the fundamental requirement in the AFDC program that only currently and actually available income

be considered in determining need. *Van Lare* v. *Hurley, supra,* relying upon *King* v. *Smith, supra; Lewis* v. *Martin,* 397 U.S. 552 (1970); section 402(a)(7) of the Social Security Act, 42 U.S.C. §602(a)(7); and 45 C.F.R. §§233.20(a)(3)(ii)(D), 233.90(a).[38]

The holding in *Van Lare* v. *Hurley, supra,* clearly applies to the facts of this case, as is confirmed by a comparison of the application of the New York and Texas prorating policies to similar plaintiff families in the two states. In both *Van Lare* and the instant case there was a family consisting of a mother, her child, a disabled adult sister, and, in Texas, a grandmother as well. In both cases the family had no income other than public assistance, and in both cases only the mother and child qualified for AFDC benefits. And most relevant here, both of these families received benefits computed on the basis of a reduced shelter allowance which was a proportionate share of the standard for a household size which included the ineligible relatives. In both states their shelter allowance, and therefore their

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[38] Any other conclusion in *Van Lare* would have enabled states to avoid the full impact of the regulation sustained in *Lewis* v. *Martin, supra,* which forbade any consideration of the income of a stepparent or man assuming the role of a spouse (MARS) unless such income was actually being contributed. If a state could simply have assumed the income of the stepparent or MARS (whether such income existed or not) to be available in an amount equal to a pro rata share of the shelter allowance, and the grant could accordingly have been reduced, the HEW regulation would have been gutted. See *Taylor* v. *Lavine,* 497 F.2d 1208, 1217 (2d Cir. 1974) (Oakes, C.J. dissenting), *reversed, Van Lare* v. *Hurley, supra.*

actual benefits, would have increased if the destitute relatives had left the house.[39]

Texas argues that *Van Lare* v. *Hurley, supra,* is distinguishable, however, in that the New York policy was an assumption of income and the Texas policy which achieved the identical result was not. Unfortunately for Texas, New York had also attempted to avoid the decision reached in *Van Lare* by arguing that its policy was not an assumption of income. Thus New York described its prorating policy as a simple determination of household shelter allowances on a per capita basis, with the allowances of those members of the household who were AFDC recipients added together to determine the AFDC benefit. It explicitly and repeatedly denied that it was presuming any income to the AFDC

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[39] The shelter standards were computed as follows:

	Texas (Ortega)	*New York* (Taylor)
AFDC family	Mother, child	Mother, child
Others in household	disabled sister, mother	disabled sister
Actual shelter cost	$51	$180
Maximum shelter standard for mother and child	$33	$145
Maximum shelter standard for the full household (size of household)	$44(4)	$165(3)
Prorated shelter standard used	2/4 × $44 = $22	2/3 × $165 = $110
Actual non-public assistance income of any member of the household	$0	$0

See statements of facts in Brief for Appellants in *Van Lare* v. *Hurley,* No. 74-453, at 13-14.

family.[40] In addition, New York relied upon the Second Circuit's acceptance of its argument, now Texas' argument, in *Taylor* v. *Lavine, supra,* 497 F.2d at 1215-1216. Nonetheless, this Court reversed *Taylor* and held that the prorating regulations were "based on the assumption that the nonpaying lodger is contributing to the welfare household, without inquiring into whether he in fact does so." *Van Lare* v. *Hurley, supra,* 421 U.S. at 346.

Perhaps aware that its argument had been pressed by New York and rejected by this Court, Texas attempts to show that New York was not entitled to the argument. Thus Texas claims that the New York regulations operated differently from the Texas regulations in that New York, unlike Texas, ascertained the actual income of the non-recipient and then automatically assumed that a portion of that income was available to the family whether it had been made available or not. Petitioners' Brief at 13-14. This characterization of New York's policy is plainly incorrect. New York only applied the prorating policy after finding that the non-recipient had in fact contributed nothing, or less than $15, upon which it assumed that the non-recipient contributed a pro rata share of the shelter cost whether or not he had income and regardless of the amount of that income. Indeed, New York explicitly advised the Court, and the Court agreed, that assuming that the actual income of

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[40] The New York prorating regulation "makes no assumption of support or 'contribution' by the lodger to the recipients but merely distinguishes the shelter needs of one from the other in order to meet only the recipients' needs from public funds." Brief for Appellants in *Van Lare* v. *Hurley,* No. 74-453 (1974 Term), *supra,* at 41-42. For New York's repeated insistence that its prorating policy was a determination of need, not an assumption of income, see the aforementioned brief throughout and the Reply Brief for Appellants in *Van Lare* v. *Hurley, supra,* at 1-7.

the non-recipient was available to the recipient would undermine the regulation sustained in *Lewis* v. *Martin, supra.*[41] Brief of Appellants in *Van Lare* v. *Hurley, supra; Van Lare* v. *Hurley, supra,* 421 U.S. at 347.

When HEW amended its regulations to implement *Van Lare* v. *Hurley, supra,* it certainly understood that that decision addressed the prior Texas policy. Thus, the agency amended the portion of its regulations concerning standards of assistance, 45 C.F.R. §233.20(a)(2) (not the section on "income and resources", 45 C.F.R. §233.20(a)(3)) to read as follows:

> Provide that the money amount of any need item included in the standard will not be prorated or otherwise reduced solely because of the presence in the household of a non-legally responsible individual; and the agency will not assume any contribution from such individual for the support of the assistance unit. 45 C.F.R. §233.20(a)(2)(viii); 42 Fed. Reg. 6583-4 (Feb. 3, 1977).

Since Texas prorated the shelter and utility allowances solely because of the presence of a non-legally responsible relative in the house, it assumed income in violation of

[41] Texas did not have a special rule as New York did for treatment of contributions above and below $15, but the arguments to the Court and the decision in *Van Lare* did not turn upon that feature of the New York policy, and, as shown above, the basic prorating policy achieved identical results in New York and Texas. The Texas prorating policy contained one feature not considered by this Court in *Van Lare*. Under the Texas policy, AFDC recipients living in the home of non-recipients also had their grants based upon a prorata shelter allowance. The validity of that provision is not at issue, since the Fifth Circuit found for petitioner on that issue and respondent chose not to pursue that claim.

section 402(a)(7) of the Social Security Act and therefore unlawfully reduced that standard.

B. *Texas Has Impermissibly Reduced Its Needs Standards Below 1969 Levels in Violation of Section 402(a)(23) of the Social Security Act.*

While states were required to make a one-time increase in needs standards by July 1, 1969 pursuant to section 402(a)(23) of the Social Security Act, they were not locked into any particular structure of needs standards. Thus states like New York and Texas could move from individualized standards based upon age of children and separate standards for different needs to consolidated standards for all families of a certain size. It was critical, however, that the new standards not obscure the extent to which actual benefit payments failed to meet needs standards fully reflecting the one-time increase in the cost-of-living. The Supreme Court therefore held that the states, in making such consolidations, had to assure that "all factors in the old equation are accounted for and fairly priced" and that "the consolidation on a statistical basis reflects a fair averaging." *Rosado* v. *Wyman, supra,* 397 U.S. at 419.[42]

The issue in this case is whether a state satisfies section 402(a)(23) by averaging together shelter allowances that were lower than federal law permits, even though they had been increased to 1969 levels. Texas consolidated its standards by averaging together all individualized stan-

[42] A state would have much more flexibility if it had increased its standards above the up-dated level required by section 402(a)(23) and now wishes to restructure and reduce standards. That issue does not arise here, however, since the standards Texas restructured were those adopted in order to comply with section 402(a)(23) and only reflect 1969 cost-of-living levels.

dards from four months in 1971 and 1972, including shelter and utility allowances that had been reduced by its unlawful prorating policy. Since the prorated allowances were unlawfully reduced, they understated the need for shelter and therefore obscured the true standard. Thus respondent Ortega, whose shelter allowance would have been $33 if the unlawful prorating policy had not been applied, received a grant based upon a shelter allowance of only $22. By including this reduced figure in the averages to create new standards for all families, Texas developed standards which understated or concealed the true need of all recipients.

We submit that such an averaging fails to satisfy section 402(a)(23), for the prior prorated shelter and utilities allowances were not "fairly priced," but, as *Van Lare* held, unfairly priced. They therefore failed to reveal the extent to which the benefits paid by Texas in 1971 and 1972 had failed to meet needs under the true 1969 standards.[43] Texas has therefore been able to maintain that it continues to provide payments equal to 75% of 1969 need levels, whereas a fairly priced standard would show that Texas is in fact paying significantly less than 75% of those levels. If Texas is not required to adjust its standards now, it will be able to continue to avoid the current consequence intended by section 402(a)(23) simply because its past illegality was not challenged.[44]

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[43] The failure to include the full shelter allowance in the averaging process is no different from omitting certain items of need in the consolidation. This Court has held that New York could not lower its standard of need by eliminating items that had previously been provided. *Rosado* v. *Wyman, supra,* 397 U.S. at 416. Similarly Texas cannot refuse to include needs which it had identified but then unlawfully chose not to consider.

[44] *Rosado* involved a consolidation of personal needs items, but not shelter. If New York now chose to consolidate its shelter

The invalidity of using prorated allowances in calculating a consolidated standard under section 402(a)(23) posed no difficulty to the court below or to the two Courts of Appeals which had previously considered that or a similar question. The Second Circuit, for example, had to decide many issues concerning the extent to which Connecticut had complied with section 402(a)(23) when it consolidated its standards, and it determined that the precise issue in the instant case, whether former prorated standards could be included in averaging to reach a new consolidated average, was "the easiest" issue of all. Since the Court found the former Connecticut prorating scheme invalid under *Van Lare* v. *Hurley, supra,* it held that section 402(a)(23) "does not permit continuation of an unlawful scheme simply because it was updated" and remanded the case for upward adjustment of the standard. *Johnson* v. *White,* 528 F.2d 1228, 1236-37 (2d Cir. 1975).

The First Circuit had to resolve a similar issue when Rhode Island constructed its new standard on the basis of prior standards which had been unlawfully reduced because income from non-related men living in the home had been assumed available to the family in violation of the Social Security Act, *see Lewis* v. *Martin, supra.* The Court concluded that section 402(a)(23) precluded the state from basing its new needs level on the former unlawfully reduced levels.[45] *Roselli* v. *Affleck,* 508 F.2d 1277 (1st Cir. 1974).

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standards, it could not use its former prorated standards since they have been eliminated by *Van Lare.* There is no reason for Texas to have an advantage over New York in its ability to avoid the consequences of section 402(a)(23).

[45] Similarly, section 402(a)(23) barred Illinois from consolidating prorated standards into its new shelter allowance if those standards were based upon an assumption of income, but not if

Texas' only argument addressed to section 402(a)(23) is that the correctness of its 1972 standards was sustained in *Jefferson* v. *Hackney*, 406 U.S. 535 (1972). Petitioners' Brief at 11. Yet that decision, and the briefs in that case of the parties and of the United States as *amicus*, were concerned only with whether countable income could be subtracted from a percentage reduced payment standard that was less than the updated need standard. Prorating was not raised, perhaps because none of the named plaintiffs in that case alleged that they had shelter allowances that had been prorated. *Jefferson* v. *Hackney, supra*, No. 70-5064, App. 17-18. Moreover, *Jefferson* was litigated before the implementation of the averaging complained of herein, so that the allowances for the named plaintiffs had not been lowered as the result of the consolidation. The validity of including prorated allowances in the average was therefore not before the Court.

In sum, Texas has obscured its true needs standards and has therefore avoided the political consequences that would flow from the revelation that it is meeting an even smaller proportion of its 1969 standards than it is acknowledging. The Texas standards must therefore be revised to comply with the requirements of section 402(a)(23).

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those standards reflected actual contributions from the non-recipients living in the household. *Illinois Welfare Rights Org.* v. *Trainor*, 438 F. Supp. 269 (N.D. Ill. 1977). This issue did not arise in *New Jersey Welfare Rights Org.* v. *Cahill*, 349 F. Supp. 501, 505 (D.N.J. 1972), *aff'd*, 483 F.2d 723 (3d Cir. 1973), since New Jersey excluded from its average all families whose standards had been reduced because there were persons in the household who were not receiving public assistance. The District Court did conclude in addressing another issue that the *Rosado* fair pricing requirement would be violated if the average included needs amounts for families that were below the appropriate level. 349 F. Supp. at 512.

CONCLUSION

For the reasons stated above, this Court should affirm the decision of the Court of Appeals both as to jurisdiction and to the merits of respondents' claim.[46]

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[46] After the district court's memorandum and opinion was filed on February 11, 1975, but prior to entry of judgment, respondents filed a motion, pursuant to Rules 15 and 52(b) of the Federal Rules of Civil Procedure, to reopen the opinion of the court and for leave to file an amended complaint raising due process claims that they previously raised in response to the state's motion for summary judgment. App. A-15. The court's final judgment against respondents was entered on April 15, 1975. Thereafter, respondents filed a second motion, pursuant to Rules 15, 52(b) and 59(e), to modify the judgment and for leave to file an amended complaint containing their due process allegations. App.

A-16. Both of respondents' motions to amend were denied by the district court on May 9, 1975.

In their notice of appeal to the Court of Appeals for the Fifth Circuit, respondents specifically challenged the district court's failure to permit them to amend their complaint to plead their due process claims. R. 320. The Court of Appeals, however, had no reason to reach this question because it found jurisdiction under 28 U.S.C. § 1343(4) and it granted respondents' claims under the Social Security Act.

Rule 15(a) of the Federal Rules of Civil Procedure establishes a liberal standard for the amendment of pleadings, and a district court's denial of leave to amend is subject to review for abuse of discretion. *Zenith Radio Corp.* v. *Hazeltine Research, Inc.*, 401 U.S. 321, 330-32 (1971); *Foman* v. *Davis*, 371 U.S. 173, 182 (1962). Furthermore, 28 U.S.C. §1653 provides that "defective allegations of jurisdiction may be amended . . . in the trial or appellate courts." Since the due process claims that respondents sought to raise may have had an impact on the jurisdiction of the district court, they should have been permitted to amend their complaint both prior to and after judgment. *See Harkless* v. *Sweeney Ind. School Dist.*, 554 F.2d 1353, 1359 (5th Cir.), *cert. denied*, 98 S. Ct. 507-08 (1977); *Singleton* v. *Vance Cy. Bd. of Ed.*, 501 F.2d 429 (4th Cir. 1974); *Lidie* v. *State of California*, 478 F.2d 552 (9th Cir. 1973).

If this Court determines that there is no subject matter jurisdiction over respondents' statutory claims, or if it finds jurisdiction but rules against respondents on the merits, it should remand to the Court of Appeals for consideration of whether respondents' motions to amend should have been granted. Alternatively, it should remand for consideration of alternative jurisdictional grounds under 28 U.S.C. §1331 or §1337.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-719

JEROME D. CHAPMAN, COMMISSIONER OF THE TEXAS DEPARTMENT OF HUMAN RESOURCES, *et al.*,
Petitioners,

v.

HOUSTON WELFARE RIGHTS ORGANIZATION, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

SUPPLEMENTAL BRIEF OF RESPONDENTS

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SUPPLEMENTAL BRIEF OF RESPONDENTS

PRELIMINARY STATEMENT

This supplemental brief is submitted, pursuant to Rule 41(5) of the Rules of the Supreme Court, in order to bring to the Court's attention materials pertaining to the background and purpose of 28 U.S.C. § 1343(4) that recently have been obtained by respondents from the United States Department of Justice under the Freedom of Information Act. Although respondents' FOIA request was made more than a month prior to the filing of their brief in chief, the materials discussed herein were not made available by the Department until after the brief was filed. Copies of each

of the documents discussed have been lodged with the Clerk of the Court and served upon counsel for petitioners.

ARGUMENT

Contemporaneous Memoranda Prepared by the Department of Justice Demonstrate That 28 U.S.C. § 1343(4) Was Intended to Provide Jurisdiction Over Claims Arising Under All of the Civil Rights Statutes, Including Section 1983.

28 U.S.C. § 1343(4) was originally introduced in the 84th Congress as part of a package of civil rights amendments recommended by the Eisenhower administration. The bill was passed by the House of Representatives, but no action was taken on the proposal by the Senate. The provision was reintroduced in the 85th Congress in the same form as part of H.R. 6127, which eventually became the Civil Rights Act of 1957. Pub. L. No. 85-315, 71 Stat. 634.

The proposals that became the Civil Rights Act of 1957 were all drafted within the Department of Justice. See Anderson, *Eisenhower, Brownell, and the Congress: The Tangled Origins of the Civil Rights Bill of 1956-57* (1964). As originally drafted, the Justice Department proposal contained changes in the civil rights criminal laws, 18 U.S.C. §§ 241-242, expanded 42 U.S.C. § 1983 to allow suits by private individuals whether or not the defendant had acted under color of state law, and permitted actions by the Attorney General to enforce 42 U.S.C. §§ 1983 and 1985(1)-(3). A copy of the draft bill has been lodged with the Clerk. The draft bill also amended 28 U.S.C. § 1343 by adding subsection 4 in the form that was ultimately adopted by Congress in 1957. An internal memorandum explaining the reasons and effects of this amendment states as follows:

> Section 1343 of Title 28 now does confer upon the United States District Courts jurisdiction to entertain actions under the civil rights statutes in Title 42, specifically 42 U.S.C. 1985 and generally other statutes in Title 42. It is deemed desirable to add another paragraph to Section 1343 to cover *all* the civil rights statutes now in existence or hereafter added, by using very general language including "civil rights, including the right to vote." It would seem that the District Courts would have jurisdiction under these civil statutes without specific reference thereto in section 1343, but in the absence of such reference a court might find that the $3000 or more requirement of 28 U.S.C. 1331 would apply. (Emphasis in original.)

A copy of this analysis has also been lodged with the Clerk.

Although the amendments to section 1983 were dropped from the bill before the Justice Department sent its proposals to Congress, see Anderson, *supra* at 20, the amendments to sections 1985 and 1343 remained in the bill.[1] Nothing in the Committee reports or legislative history suggests that the broad purpose originally envisioned for section 1343(4) by the Department was ever altered. Thus, even after the Senate refused to accept the proposed changes in 42 U.S.C. § 1985, the jurisdictional provision was retained in the

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[1] When Attorney General Brownell transmitted the administration's civil rights proposals to Congress on April 9, 1956, he was not authorized by the White House to recommend the proposed amendments to section 1985 or section 1343. Anderson, *supra* at 39. He did, however, commend those provisions to Congress for its consideration, *Id.* , and at the request of Representative Keating, a member of the Judiciary Committee, he transmitted those proposals to the Committee without formal administration endorsement. *Id.* at 40-41.

bill. The only possible explanation for retaining section 1343(4) was that given in the original Justice Department analysis: the provision was intended to eliminate any doubts about district court jurisdiction without regard to the amount in controversy over "all the civil rights statutes now in existence or hereafter added."

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September 27, 1978

No. 77-719

In the Supreme Court of the United States

OCTOBER TERM, 1977

JEROME D. CHAPMAN, COMMISSIONER OF THE TEXAS DEPARTMENT OF HUMAN RESOURCES, ET AL., PETITIONERS

v.

HOUSTON WELFARE RIGHTS ORGANIZATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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CITATIONS

Cases:

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Constitutions, statutes, and regulations:

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45 C.F.R. 233.20(a)(3)(ii)(*c*) (1974) — 7
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18 N.Y.C.R.R. § 352.30(d) — 14, 16-17
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42 Fed. Reg. 13262 — 6
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QUESTION PRESENTED

The United States will discuss the question whether a state may compute a welfare recipient's standard of need by prorating and excluding the portion of shelter and utility expenses attributable to a non-eligible person residing with the welfare family.[1]

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[1] Petitioners also present (Br. 4-5, 8-10) the question whether the district court had jurisdiction under 28 U.S.C. 1343(4) to decide this case, in which no single plaintiff satisfies the $10,000 amount in controversy requirement for jurisdiction under 28 U.S.C. 1331(a). See Pet. App. A-8 to A-10, B-30 n. 1; cf. *Snyder* v. *Harris*, 394 U.S. 332. We do not

INTEREST OF THE UNITED STATES

This case presents the question whether Texas's method of computing benefits under the Aid to Families with Dependent Children (AFDC) program is consistent with federal statutes and with the regulations promulgated by the Secretary of Health, Education, and Welfare. Because the AFDC program is financed by matching federal and state funds, and because the statute requires state programs to comply with federal regulations (see 42 U.S.C. (and Supp. V) 602(a); *King* v. *Smith*, 392 U.S. 309), the Court's decision in this case could affect both the proper expenditure of federal monies and the Secretary's future decisions whether to approve state plans submitted to him. The United States therefore has a substantial interest in this case.

STATEMENT

A. The Texas Proration Policy

Under the AFDC program, 42 U.S.C. (1970 ed. and Supp. V) 601 *et seq.*, each participating state first establishes a standard of need to determine eligibility for benefits. It then sets the level of benefits to be paid, *i.e.*, the proportion of the standard of need that will be provided. Both the standard of need and the level of benefits vary from state to state. See generally *Jefferson* v. *Hackney*, 406 U.S. 535.

The Texas AFDC program is administered by the state Department of Public Welfare. Prior to March

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address this issue because there is no independent federal interest in its resolution.

1, 1973, the Department had three categories of "need"—personal needs allowance, shelter allowance, and utilities allowance—and a ceiling for each category (App. A-19 to A-21, A-25 to A-28). The Department calculated every family's need for each category, and the sum of need for the three categories was the need for the family. The state allowed payments of as much as 75 percent of the total need. Having ascertained both the standard of need and the maximum payment for each family, the Department subtracted available non-welfare income to compute the grant to be made (App. A-27; see also *Jefferson* v. *Hackney*, *supra*, 406 U.S. at 539-541).

In making its determination of the standard of need, Texas long had a policy of prorating or reducing the maximum allowable shelter and utility allowances if a non-eligible person resided with an AFDC recipient (Pet. App. A-19). The state treated some of the shelter and utility allowances as attributable to the ineligible person, and it subtracted this attributed portion from the level of need that would have been recognized if every member of the household had been eligible for benefits. This meant, in practice, that benefits paid to the AFDC family were reduced on account of each ineligible person in the household, whether or not the ineligible person contributed any financial support to the household.

The proration policy in effect prior to March 1, 1973, was set forth in Sections 3122 and 3122.3 of the Texas Department of Public Welfare Financial Services Handbook, Revision Number 23. It pro-

vided that, when an AFDC recipient shared living arrangements with non-dependent relatives, the recipient's budget, used in determining his standard of need, would be measured by his "prorata share" of the total utility and shelter expense "provided the non-dependent relative does not meet this expense for him."[2] This policy had a substantial effect on

[2] Paragraph 5 of Section 3122 provided (App. A-36):

> When a recipient shares living arrangements with non-dependent relatives, his budget will carry his prorata share and that of his dependents of the utility chart figure, provided the nondependent relative does not meet this expense for him.

Paragraphs 4-6 of Section 3122.3 provided (App. A-35):

> When the applicant or recipient lives with non-dependent relatives in their shelter, his prorata share(s) of the shelter expense within the group maximum shall be budgeted provided the non-dependent relative does not meet all this expense for him. This means that the applicant and/or recipient must actually be participating in meeting shelter expense before his prorata share(s) can be budgeted.
>
> When non-dependent relatives live with the applicant in his shelter, the applicant's prorata share(s) of the shelter expenses within the group maximum shall be an allowable expense, providing the non-dependent relatives do not meet this expense for him.
>
> Regardless of the economic situation of the non-dependent relative in either of the above situations, both shelter and utilities will be budgeted only in the amount of the prorata share for the applicant and his dependents.

Although the regulations refer only to instances where "non-dependent relatives" live with a recipient, the state and the courts below construed these provisions as applicable to all cases where a recipient lived with any non-eligible person (Br. 6; Pet. App. A-19 to A-20, B-33 to B-34).

families living with ineligible persons.[3]

On March 1, 1973, Texas discontinued the practice of adding categories of need to determine an individual standard of need for each family. The state adopted a "flat grant" system that used only two factors—the number of recipients in the family unit and whether the family included a caretaker recipient—to fix the standard of need (App. A-28, A-31). The standard of need for each family size was determined by averaging the amounts that had been paid to similar families in four representative months (November 1971, February 1972, May 1972, and August 1972) (App. A-48 to A-63). The conversion to this flat grant system was approved effective February 1, 1973, by the Associate Regional Commissioner, As-

[3] The operation of the proration policy is illustrated by the administrative decision issued in the case of respondent Paula Ortega, who receives AFDC benefits for herself and her son (App. A-5). Respondent's sister (who is permanently disabled) and her mother live with her (*ibid.*). In 1971 respondent's shelter and utilities allowances were both reduced by application of the proration policy (App. A-45 to A-47). The maximum shelter allowance for four persons was $44, or $11 per person, and thus $22 was set as the need for respondent and her son (*ibid.*). The utility allowance was $13 per family, and thus $3.25 for each of the four persons, with $6.50 allowed for respondent and her son (*ibid.*). Their standard of need thus was fixed as $28.50, plus the need for food. If, however, respondent's mother and sister had not resided with them, the standard of need would have been $46 plus food, composed of $33, the maximum housing allowance for two persons, plus $13 for utilities (see App. A-21).

sistance Payments Administration, Social and Rehabilitation Service[4] (see App. A-40 to A-43, A-57).

B. The Present Proceedings

On March 27, 1973, respondents filed this suit in the United States District Court for the Southern District of Texas. They contended, *inter alia*, that (1) Texas's proration policy prior to March 1, 1973, violated the federal statute and the implementing regulations; and (2) because the flat grants paid after March 1, 1973, were calculated by averaging the amounts paid during 1971 and 1972, the flat grant system carried forward the effects of the previous policy and was likewise invalid (App. A-11 to A-13). The complaint requested declaratory and injunctive relief, as well as retroactive payments of benefits computed without regard to proration (App. A-2 to A-3, A-12 to A-13).

On February 11, 1975, the district court certified the suit as a class action on behalf of AFDC recipients whose benefits had been reduced by the conversion to the flat grant system (Pet. App. A-10). The court upheld the conversion to a flat grant system, relying in major part on *Rosado* v. *Wyman*, 397 U.S. 397, 419, in which this Court concluded that a state's conversion to a flat grant system does not violate 42 U.S.C 602(a)(23), providing that all the factors in the old equation are "accounted for

[4] The Assistance Payments Administration is now part of the Social Security Administration. See 42 Fed. Reg. 13262.

and fairly priced and providing the consolidation on a statistical basis represents a fair averaging * * *."

The district court also upheld Texas's proration policy and the influence that policy had had on the standard of need after conversion to the flat grant system. It rejected respondent's contention that the proration policy contravened 42 U.S.C. 602(a)(7) and that section's interpreting regulations, 45 C.F.R. 233.90(a) and 45 C.F.R. 233.20(a)(3)(ii)(*c*) (1974), which provide that the state agency in determining need shall take into consideration the income and resources of the child, including only the net income of the parent in the absence of the proof of actual contribution from others. The district court concluded that the proration policy had not operated as an impermissible assumption of income, but rather had been a proper method of determining the standard of need for AFDC recipients living in households that also included non-recipients whose needs were not compensable under the Act (Pet. App. A-19 to A-24).

The court of appeals agreed with the district court that the conversion to a flat grant system was proper (Pet. App. B-40 to B-45).[5] It held, however, that Texas's standard of need must be revised to eliminate any continuing influence of the proration policy, which it found had been unlawful. The court saw no meaningful distinction between Texas's proration policy and the state regulations held invalid in *Van Lare* v.

[5] The approval of the conversion is no longer an issue in the case.

Hurley, 421 U.S. 338, because both were based on the presumption that an ineligible person living in an AFDC household would contribute to the costs of the shelter and utilities whether or not the ineligible person did so. The court also concluded (Pet. App. B-38) that the Texas policy contravened 45 C.F.R. 233.90 (a), because (Pet. App. B-38):

> The presumption that a recipient's shelter and utility expenses are lowered—creating less need—when a non-recipient lives in the household implicitly presumes that the non-recipient's income is available to offset his share of the shelter and utility costs. [Citations omitted.] If not, the recipient's "need," in terms of actual shelter cost, will not decrease.

Finally, the court of appeals concluded that the invalid proration policy had infected the averaging process used to convert to the flat grant system of March 1, 1973, and had obscured the standard of need (Pet. App. B-40 to B-41). Accordingly, the court held that Texas must recompute its standard of need free of the taint of proration (Pet. App. B-46).[6]

SUMMARY OF ARGUMENT

A. The proration policy Texas employed until 1973 was abandoned, at least in name, when the state converted to a system under which a family's "standard of need" is fixed by reference to two factors: the number of persons in the family, and whether the family includes a caretaker. The lawfulness of this pre-1973 policy is a matter of more than academic interest, however, because the present system for fixing the standard of need is based on an averaging of benefits paid during years when the proration policy was in effect. If the proration policy unlawfully reduced the standard of need for individual families in those years, it also reduced the averages from which current benefits were computed and thereby obscured the actual standard of need. Although the states may provide a level of benefits that gives AFDC recipients less than 100 percent of their standard of need, federal law prohibits the states from obscuring the actual standard of need. *Rosado* v. *Wyman*, 397 U.S. 397.

B. In *Van Lare* v. *Hurley*, 421 U.S. 338, this Court concluded that the Social Security Act and implementing regulations prohibit states from assuming that a non-legally responsible person living with a welfare family will apply his resources to aid a welfare child. Texas's proration policy was invalid under *Van Lare*, because the mere presence of an ineligible person in the AFDC household resulted in a decrease in benefits to the needy child—whether or not that person contributed any amount to the child or even paid his own housing expenses. It makes no difference that Texas did not in express terms presume that the child received income from the ineligible person. Texas's program, which reduced the

[6] The court held that the Eleventh Amendment bars an award of retroactive benefits (Pet. App. B-45).

"standard of need" of the family whenever an ineligible person was in the residence, had the same effect on children as does an attribution of income. Indeed, New York had sought to justify the regulation at issue in *Van Lare*—which did not expressly mention income—on the same grounds as petitioners advance here.

The Secretary also has rejected the arguments petitioners advance, and the current federal regulations provide that "the money amount of any need item included in the standard will not be prorated or otherwise reduced" simply because an ineligible person resides with an AFDC family. 45 C.F.R. 233.20 (a)(2)(viii). These regulations make it clear that Texas's proration policy was invalid.

Insofar as Texas's current flat grant system perpetuates the effects of the invalid proration policy, it conflicts with the Act and federal regulations, and it too is invalid. Accordingly, Texas's current standard of need must be recomputed, even though the resulting change in actual disbursements may be small.

ARGUMENT

A. The Standard Of Need Used By A State Must Reflect Actual Need

The proration policy that Texas applied until 1973 was abolished, at least in name, by the state's conversion to a system under which a family's "standard of need" is fixed by reference to but two factors: the

number of persons in the family and whether the family includes a caretaker recipient (App. A-28, A-31). The vice of the proration system was that benefits would be reduced when an ineligible person lived with the eligible family, whether or not that person contributed to the family or to the cost of lodging. See *Van Lare* v. *Hurley*, 421 U.S. 338. Since February 1973, however, Texas has not reduced any family's grant when an ineligible person shared its dwelling. It therefore might appear at first glance that the lawfulness of Texas's pre-1973 policy is of no more than academic interest, given the court of appeals' unchallenged holding (Pet. App. B-45) that the Eleventh Amendment prohibits the award of retroactive benefits.

The proration policy has outlived its nominal demise, however. The present system for fixing the "standard of need" depends on an averaging of benefits that were paid in 1971 and 1972, years when the proration policy was in effect. If the proration policy unlawfully reduced the standard of need for numerous families during those years, therefore, it also reduced the average on which today's benefits are computed. Petitioners appear to argue that this is immaterial because, under the principles of *Jefferson* v. *Hackney*, 406 U.S. 535, a state is entitled to set a "level of benefits" that gives AFDC recipients less than 100 percent of their computed "standard of need." Texas now pays recipients a maximum of only 75 percent of their standard of need. Thus, petitioners apparently argue, whether or not the proration

policy reduced the average standard of need in 1971 and 1972, respondents could not benefit, because the state could simply reduce its level of benefits if it were required to increase its standard of need.

This superficially plausible argument fails because Congress has required states to compute the standard of need accurately whether or not they choose to make the level of benefits commensurate with the standard of need. 42 U.S.C. 602(a)(23). As the Court explained in *Rosado* v. *Wyman*, 397 U.S. 397, 412-413, in the course of upholding a procedure for setting a uniform (rather than individually-calculated) standard of need:

> We think two broad purposes may be ascribed to [the federal statute]: First, to require States to face up realistically to the magnitude of the public assistance requirement and lay bare the extent to which their programs fall short of fulfilling actual need; second, to prod the States to apportion their payments on a more equitable basis. Consistent with this interpretation of [the statute], a State may, after recomputing its standard of need, pare down payments to accommodate budgetary realities by reducing the percent of benefits paid or switching to a percent reduction system, but it may not obscure the *actual* standard of need.

Petitioners appear to concede (Br. 6) that the application of the proration system in 1971 and 1972 affected the computation of the average standard of

need that was announced in 1973.[7] See also Pet. App. B-40 to B-41. Consequently, if the proration system was unlawful, it "obscure[d] the *actual* standard of need", and the standard of need must be recomputed to come into compliance with federal law. After the recomputation, Texas would be free to reduce its percentage level of benefits, in which event respondents and the class they represent would be no better off, but the didactic purpose of the federal statute would be fulfilled. The state may, however, elect to leave its percentage level of benefits unchanged, in which event a recomputation of the standard of need would lead to an increase in the payments to respondents and their class. The essential question in the case, then, is whether the proration policy in effect until 1973 was lawful, and we turn to that question.

B. The Texas Proration Policy Effectively Presumed That Persons Living With An AFDC Family Who Were Ineligible For AFDC Benefits Would Contribute To The Eligible Family Or To The Expenses Of Lodgings, And It Thus Distorted The Standard Of Need

1. The New York regulations at issue in *Van Lare* reduced an AFDC family's shelter allowance if a

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[7] Petitioners' brief states (Br. 6) that "[b]oth before and after the March 1 [,1973] consolidation Texas prorated a recipient's shelter and utility expenses in calculating the standard of need if one or more noneligible individual(s) resided with the recipient." Although this statement is ambiguous, it is our understanding that Texas continued to prorate after March 1, 1973, only by the inclusion of prorated amounts in its flat grant calculation.

person ineligible for AFDC benefits shared the family residence and did not pay at least $15 per month.[8] The Court concluded (421 U.S. at 347) that the case was controlled by *King* v. *Smith*, 392 U.S. 309, and *Lewis* v. *Martin*, 397 U.S. 552, which "construe the federal law and regulations as barring the States from assuming that nonlegally responsible persons will apply their resources to aid the welfare child." Accordingly, the Court held the New York regulations invalid "insofar as they are based on the assumption that the nonpaying lodger is contributing to the welfare household, without inquiry into whether he in fact does so" (421 U.S. at 346). The Court found that the New York regulations were indeed based on such an assumption, because "the nonpaying lodger's mere presence results in a decrease in benefits"—whether or not the lodger contributed to the support of the child. 421 U.S. at 346-347.

The regulation on which the Court relied in *Van Lare*, *supra*, was 45 C.F.R. 233.90(a), which provided:

> * * * In establishing financial eligibility and the amount of the assistance payment, only such

[8] The New York regulation, 18 N.Y.C.R.R. § 352.30(d), defined a lodger as any "nonlegally responsible relative or unrelated person in the household, who is not applying for nor receiving public assistance." The same section then provided:

> In the event a lodger does not contribute at least $15 per month, the family's shelter allowance including fuel for heating, shall be a pro rata share of the regular shelter allowance.

> net income as is actually available for current use on a regular basis will be considered, and the income only of [a natural or adoptive parent, or stepparent legally obligated to support the child] will be considered available for children in the household in the absence of proof of actual contributions.

Following *Van Lare*, the Secretary amended the regulations to reflect more precisely the Court's construction of the Social Security Act. A new section was added, 45 C.F.R. 233.20(a)(2)(viii), 42 Fed. Reg. 6584, which provides:

> * * * the money amount of any need item included in the standard will not be prorated or otherwise reduced solely because of the presence in the household of a non-legally responsible individual; and the agency will not assume any contribution from such individual for the support of the assistance unit.[9]

Texas's proration policy is indistinguishable from the New York policy struck down in *Van Lare*. Under the Texas policy, as under the New York regulations, the mere presence of an ineligible person in the AFDC household resulted in a decrease in benefits to the needy child—whether or not the ineligible

[9] Similar language was added to 45 C.F.R. 233.90(a), 42 Fed. Reg. 6584:

> * * * [N]or may the State agency prorate or otherwise reduce the money amount for any need item included in the standard on the basis of assumed contributions from nonlegally responsible individuals living in the household.

person contributed any amount to the child, or even paid for his share of the cost of housing.

2. Petitioners contend (Br. 12-13), however, that the line of cases from *King* v. *Smith* to *Van Lare* applies only to state plans that presume a contribution of income, and not to a policy that "speaks only in terms of budgeting a standard of need and the item(s) to be included there." Because Texas considers proration as part of its calculation of the standard of need, petitioners argue (Br. 14-16), the policy was within its discretion. Moreover, petitioners maintain (Br. 6), the proration policy was intended "to take advantage of economies of scale and to prevent the State's limited financial resources available for Aid to Families With Dependent Children from being diverted to the benefit of ineligible persons." In our view, however, the principle of *Van Lare*, now codified in the federal regulations, does not depend on whether benefits were reduced by imputing fictitious income to a family (as in New York) or by saying that a family with the same resources is "less needy" (as Texas did). The two are functionally identical.

What is more, the portion of the New York regulations at issue in *Van Lare* provided only that unless a lodger contributed $15 to the family's expenses, the family's shelter allowance would be reduced pro rata; the regulations did not expressly mention "income." [10]

[10] One subsection dealing with instances where a female recipient was living with a man (18 N.Y.C.R.R. § 352.31) did refer to the way "his available income and resources" were to be applied, but the portion of the regulations the Court held invalid was the provision in 18 N.Y.C.R.R. § 352.30(d) quoted in n. 8, *supra*, which applied to all ineligible persons and made no reference to income. See 421 U.S. at 342, 346.

The Second Circuit, in a decision reversed by this Court in *Van Lare*, had upheld the New York regulations on the very grounds petitioners advance here, *i.e.*, that they merely provided a means of determining the recipient's needs, which were affected by the economies of scale, and prevented ineligible persons from benefiting from living space paid for by AFDC benefits. *Taylor* v. *Lavine*, 497 F.2d 1208, 1215. This Court rejected the distinction the state sought to draw in *Van Lare*, and it should do so again here. As the court of appeals correctly reasoned (Pet. App. B-38):

> The presumption that a recipient's shelter and utility expenses are lowered—creating less need —when a nonrecipient lives in the household implicitly presumes that the nonrecipient's income is available to offset his share of the shelter and utility costs. *See Hoehle* v. *Loking*, 405 F.Supp. 1167, 1174 (D.Minn. 1975), *aff'd*, 538 F.2d 229 (8th Cir. 1976). If not, the recipient's "need," in terms of actual shelter cost, will not decrease. [Petitioner's] claim that it is only reflecting the economies of scale enjoyed by large groups living together again implicitly presumes that the non recipient's income will be available to offset shelter and utilities. Without that presumption, the economies-of-scale argument is irrelevant. As examples, the total cost of shelter and utilities to the AFDC household has not changed; it remains in need of that amount. *See Taylor* v. *Lavine*, 497 F.2d 1208, 1222 (2d

Cir. 1974) (Oakes, J., dissenting); Note, 88 HARV. L. REV. 654, 658-59 (1975). If the nonrecipient moves out, the household receives a full share even though its rent obligation has not increased. Clearly, as in *Van Lare*, "the nonpaying lodger's mere presence results in a decrease in benefits", 421 U.S. at 346, 95 S.Ct. at 1747, and "the fact that the allowance varies with the lodger's presence demonstrates that it is keyed, as the regulations plainly imply, to the impermissible assumption that the lodger is contributing income to the family." 421 U.S. at 347, 95 S.Ct. at 1748.

The Secretary has concluded that "prorating the standard of need is another form of assumption of income from non-legally responsible individuals[,] which has long been prohibited by Federal regulations." 42 Fed. Reg. 6583. The present regulations reflect this view, and they provide that "the money amount of any need item included in the standard will not be prorated or otherwise reduced." 45 C.F.R. 233.20(a)(2)(viii). The states' plans must yield to authorized regulations of the Secretary (*King* v. *Smith*, *supra*, 392 U.S. at 316-319). These regulations could not be clearer, and they demonstrate that Texas's proration policy was invalid.

3. Insofar as the Texas flat grant system perpetuates the effects of the proration policy, it conflicts with the Act as construed in *Van Lare* and the revised federal regulations, and it, too, is invalid. *King* v. *Smith*, *supra*, 392 U.S. at 333 n. 34; *Townsend* v. *Swank*, 404 U.S. 282, 286; *Burns* v. *Alcala*,

420 U.S. 575, 578. Accordingly, the court of appeals properly concluded (Pet. App. B-46) that Texas must recompute the flat grant standards of need to purge the averages "of the proration taint." [11]

We recognize that the change in Texas's flat grant standard of need resulting from the elimination of prorated cases may be slight. Despite petitioners' apparent admission that the invalidation of its proration policy would require the establishment of a new standard of need (Pet. App. B-41), the statistical significance of including prorated cases in the averaging process has not been demonstrated. Additionally, because Article 3, Section 51-a, of the Texas Constitution limits state financial participation in federal welfare programs to $80,000,000, it is possible that recomputation may result in no increase in actual disbursements of AFDC payments. See *Jefferson* v. *Hackney*, *supra*, 406 U.S. at 537 n. 1. The record does not indicate whether current benefits could be increased without exceeding this constitutional maximum.

Nevertheless, Texas's standard of need must be recomputed—even if the change in actual disburse-

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[11] Petitioners also argue (Br. 10-12) that the court of appeals' decision conflicts with this Court's conclusion in *Jefferson* v. *Hackney* that Texas complied with 42 U.S.C. 602(a)(23). *Jefferson*, however, addressed only the contention that the method by which Texas computed the percentage reduction of all benefits to accommodate the state's budgetary limits violated Section 602(a)(23). 406 U.S. at 545. Texas's proration policy was not at issue, and the Court did not consider any questions concerning the allocation of benefits within categories of assistance.

ments is small—because the proration was contrary to federal requirements discussed above and because it obscured the true level of need. *Rosado* v. *Wyman*, *supra*, held that consolidation to a flat grant system using a statistically fair averaging is permissible only when "all factors in the old equation are accounted for and fairly priced." 397 U.S. at 419. As the court of appeals concluded (Pet. App. B-40 to B-41), Texas's inclusion of prorated amounts paid for shelter and utilities in the averaging process necessarily skewed the standard of need downward and prevented the fair pricing of the shelter and utilities component of the consolidated standard of need.[12]

CONCLUSION

If this Court reaches the substantive issues, it should affirm the judgment of the court of appeals.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

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MAY 1978.

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[12] In the instant case the administrative burden and cost of recalculating the standard of need for the future cannot be avoided, although it may be possible to minimize these effects by techniques such as sampling.

This is not a case in which a state has increased the amount of its flat grants since the July 1, 1969, reappraisal required by 42 U.S.C. 602(a)(23). In cases where there has been such an increase, a state might argue that any carry-over effect of its past proration has been offset by increases in the amounts of its flat grants.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-719

JEROME D. CHAPMAN, COMMISSIONER OF THE TEXAS DEPARTMENT OF HUMAN RESOURCES, et al., *Petitioners,*

v.

HOUSTON WELFARE RIGHTS ORGANIZATION, et al., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF AMICUS CURIAE OF EAST TEXAS LEGAL SERVICES, INC.

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On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF AMICUS CURIAE OF EAST TEXAS LEGAL SERVICES, INC.

QUESTIONS PRESENTED FOR REVIEW

I.

Does 28 U.S.C. § 1343 (4) give federal courts jurisdiction over an action asserting that Texas' Aid to Families With Dependent Children Program failed to comply

with federal requirements, under statute providing federal jurisdiction to recover damages or to secure equitable or other relief under civil rights laws?

II.

(A) Does the decision of the Court of Appeals for the Fifth Circuit holding that Texas must recalculate its standard of need in the Aid to Families With Dependent Children Program conflict with this Court's prior ruling specifically upholding same in *Jefferson* v. *Hackney*, 406 U.S. 535 (1972)?

(B) Did the Court of Appeals misinterpret this Court's ruling in *Van Lare* v. *Hurley*, 421 U.S. 338 (1975), to apply to a state's calculation of its standard of need in addition to determinations concerning available income?

Did the decision of the Court of Appeals for the Fifth Circuit intrude into the calculation of a standard of need in a state's Aid to Families With Dependent Children Program, an area explicitly reserved to the states by this Court in *Dandridge* v. *Williams*, 397 U.S. 471 (1970) and *Jefferson* v. *Hackney*, *supra*?

INTEREST OF THE AMICUS

Established in 1977, East Texas Legal Services, Inc., is a federally funded non-profit corporation existing for the express purpose of providing quality legal services to low income persons within its geographic jurisdiction.

East Texas Legal Services, Inc., serves ten counties in Deep East Texas, they are: Orange, Jefferson, Nacogdoches, Angelina, Cherokee, San Augustine, Smith, Harrison, Gregg and Rusk. Additionally, the organization will,

in 1978, expand its services to include the following five counties in Texas: Bowie, Cass, Red River, Morris and Titus. Statistics reflect that within the present ten county area of East Texas Legal Services, Inc., there are in excess of 160,000 people living in poverty as defined by the federal government, with approximately 18,000 persons receiving Aid for Families with Dependent Children as administered by the State.

East Texas Legal Services, Inc., maintains a vital interest in protecting the nature and quality of the rights of those who are in its prospective client community.

It submits this brief because it strongly believes that both the substantive and jurisdictional issues presently before the Court will significantly impact the ability of members of our client community to bring within their reach "the same opportunities that are available to others to participate meaningfully in the life of the community". *Goldberg v. Kelly*, 397 U.S. 254, 265 (1970). East Texas Legal Services, Inc., believes that the Texas policies challenged in this litigation contravenes this concept of meaningful participation. It is for this reason that the Brief *Amicus Curiae* of East Texas Legal Services, Inc., is respectfully submitted to this Court.

STATEMENT OF THE CASE

This action was brought by the respondents, wherein they challenged the manner in which the Texas Department of Human Resources disburses funds under the program known as Aid to Families with Dependent Children (AFDC). Particularly, respondents contended that the disbursement of federal funds violated federal law by (1) utilizing a flat grant system rather than as-

certaining the amount of the individual's needs, in violation of 42 U.S.C. § 602 (a) (23); and (2) by pursuing a policy of prorating shelter and utility needs if non-recipients of AFDC share the residence of the recipient, in violation of 42 U.S.C. § 602 (a) (7), 606 (b) and 602 (a) (23) (App. pp. 2-14). The jurisdiction of the district court was based on 28 U.S.C. §§ 1343 (3) and (4) with respondents raising their claims under 42 U.S.C. § 1983. (App. p. 3). The complaint sought both declaratory and injunctive relief, with respondents seeking an injunction enjoining the "reduction of shelter and utility needs by the policy of proration by the Texas Department of Human Resources". (App. p. 12). On February 11, 1975, the district court entered its memorandum and opinion, finding, *inter alia*, that the Court had jurisdiction of respondents' claims under 28 U.S.C. § 1343 (4) but not under § 1343 (3); and that the challenged statutory policies were not in conflict with the cited federal laws. Accordingly, the district court granted petitioners' motion for summary judgment. 391 F. Supp. 223 (S.D. Tex. 1975).

On appeal the United States Court of Appeals for the Fifth Circuit, affirmed the finding of the district court that jurisdiction existed under 28 U.S.C. § 1343 (4) but reversed the district court's holding that petitioners' policy of proration was not in conflict with the applicable federal laws and regulations. 555 F.2d 1219 (5th Cir. 1977). On February 21, 1978, this Court granted certiorari to consider whether the lower federal courts had properly exercised their jurisdiction over respondents' claim; whether the decision of the United States Court of Appeals that the State's policy of proration of utility and shelter needs conflicts with prior decisions of this Court; See, e.g.

Jefferson v. Hackney, 406 U.S. 435 (1972), *Dandridge v. Williams*, 397 U.S. 471 (1970); and whether the Court of Appeals had misinterpreted this Court's decision in *Van Lare v. Hurley*, 421 U.S. 338 (1975) in finding the Texas system to be constitutionally deficient.

It is the position of the *Amicus* that, under the controlling case law, the decision of the Court of Appeals should be upheld. However, we expressly note that to the extent that the Court of Appeals did not find jurisdiction under § 1343 (3), 555 F.2d 1220-1221 n. 1., it is the position of Amicus that the constitutional principles, previously enunciated by this Court, mandate a different result on the jurisdictional grounds for this action.

ARGUMENT

I.

THE COURTS BELOW DID NOT ERR IN FINDING JURISDICTION UNDER 28 U.S.C. § 1343.

At the outset Amicus wishes to apprise this Court that it fully concurs in the reasoning and arguments set forth in respondents' brief, with regard to the jurisdiction of the district court under 28 U.S.C. § 1343 (4) and the finding of the Court of Appeals that the Texas policy of prorating utility and shelter needs "violates federal regulations controlling state administration of AFDC programs. . ." *Houston Welfare Rights Organization, Inc. v. Vowell*, 555 F.2d. 1219, 1224 (5th Cir. 1977). For this reason Amicus will confine the scope of this brief to the issue of whether, by the allegations of their complaint, respondents properly invoked

federal jurisdiction under 28 U.S.C. § 1343 (3).[1] Accordingly, we turn to an examination of the relevant statutes.

The present codification of 42 U.S.C. § 1983 and 28 U.S.C. § 1343 (3) find their genesis in § 1 of the Civil Rights Act of 1871. 71 Stat. 13.[2] As originally written, § 1 provided a civil remedy for the deprivation "under color of any law" of any "rights, privileges, or immunities secured by the Constitution of the United States . . ." 71 Stat. 13. Congress wrote the jurisdictional grant into § 1 of the statute and provided concurrent jurisdiction for both the district and the circuit courts. In 1874, Congress codified the existing Statutes at Large and in so doing segregated the substantive and jurisdictional provisions of the Act. The resulting codification expanded the substantive provision to include the phrase "or of any right secured by any *law* of the United States to persons within the jurisdiction thereof", Rev. Stat. 1979; and divided the jurisdictional grants into two separate areas of the code. The scope of the jurisdiction vested in the district court by Rev. Stat. 563 (12) was "identical with that of

1. Although this issue was not technically raised in the petition for certiorari, the lower court's exercise of jurisdiction under § 1343 is at the very core of the question presented by petitioners. Cf., *Boyton v. Virginia*, 364 U.S. 454 (1960). Moreover, this issue was examined by both of the lower federal courts and has been briefed by petitioner (Brief for Petitioner, p. 8). For this reason and the reason that jurisdiction is a matter which this Court will independently examine to determine if it was properly vested in the lower federal courts, Amicus submits that this issue is properly before this Court for determination. See, e.g., *Mansfield, C.&L.M. Ry. Co. v. Swan*, 111 U.S. 379 (1884).

2. § 1343 was amended by the Civil Rights Act of 1957, 71 Stat. 634, to include what is now § 1343 (4).

the expanded substantive provision" *Lynch* v. *Household Finance Corporation*, 405 U.S. 538, 543 N. 7 (1972); while jurisdiction in the circuit court existed by virtue of Rev. Stat. 629 (16) which proscribed the deprivation of any right secured by "*any* law providing for equal rights of citizens of the United States, or of all persons within the jurisdiction of the United States." Rev. Stat. 629 (16). These two jurisdictional statutes were later merged into what is now § 1343 (3) with the "equal rights" provision being retained in the present jurisdictional grant.

Although the substantive and jurisdictional provisioning of § 1 of the Act were segregated, this court has nevertheless recognized § 1343 (3) to be the "jurisdictional counterpart" to § 1983. *Lynch*, supra, 405 U.S. at 543. It is now well established that where the right violated is of constitutional dimensions, § 1343 (3) provides jurisdiction and both statutes are to be construed identically. *Douglas* v. *City of Jeanette*, 319 U.S. 157, 161 (1943). It is apparent from its title, that the initial purpose of Congress in enacting the Civil Rights Act of 1871 was to "enforce provisions of the Fourteenth Amendment" 17 Stat. 13. On this basis, this court has recognized that an "[a]llegation of *facts* constituting a deprivation under color of state authority of a right guaranteed by the fourteenth amendment satisfies to that extent the requirement of R. S. § 1979. (1983) *Monroe v. Pape*, 356 U.S. 167. 171 (1960).[3]

3. In *United States v. Price*, 383 U.S. 787, 797 (1966) this Court, in construing 18 U.S.C. § 242, the criminal analogue to § 1983, found the phrase "rights, privileges and immunities secured by the Constitution" to include "*all of the Constitution*". Like Section 1 of the Civil Rights Act of 1871, § 242 was "originally modeled on" § 2 of the Civil Rights Act of 1866. *Lynch*, supra at 549 N. 16.

By its terms, § 1 of the Fourteenth Amendment prohibits the states from abridging the "privileges and immunities of citizens of the United States." Accordingly the question becomes whether respondents have alleged a deprivation under color of state law of any "privilege or immunity of national citizenship" within the meaning of the Fourteenth Amendment. If they have, then it clear that a constitutional violation within the meaning of § 1983 has been alleged and that jurisdiction will lie under § 1343 (3). *Hague* v. *Committee for Industrial Organization,* 307 U.S. 496, 513 (1939).

It is now well settled, that the privileges and immunities of national citizenship protected by the Fourteenth Amendment include that "limited class of interests growing out of the relationship between the citizen and the national government created by the constitution and federal laws." *Slaughter-House Cases,* 16 Wall. 36, 79 (1872). This Court has recognized that although a right finds no explicit mention in the Constitution, it may nevertheless occupy a position so fundamental to the concept of our Federal Union that it rises to the level of a constitutional guaranty within the ambit of the privileges and immunities clause of the fourteenth amendment, *United States v. Guest,* 383 U.S. 745, 758 (1966); also see, *Edwards* v. *People of State of California,* 314 U.S. 160, 178 (1941) (Douglas, J. Concurring)[4]. In the

4. The Court has, over the years, expressed its reluctance to bottom fundamental rights, which are not explicitly set forth in the Constitution, on the privileges and immunities clause of the fourteenth amendment, where an alternative means for protecting the right exists. See, e.g., *Edwards v. People of California,* supra, *Nash v. Florida Industrial Commission,* 389 U.S. 235 (1967). This judicial constraint has caused one member of this court to remark that "[T]his Court has not been timorous about giving concrete meaning to such obscure and vagrant phrases such as "due process . . . [B]ut has always hesitated to give any real meaning to the privileges and immunities clause lest it improvidently give too much" *Edwards,* supra at 183 (Jackson, J., concurring). The reason was articulated by Mr. Justice Stone in his concurring opinion in *Hague,* as follows: "[I]f its restraint upon state action were to be extended more than needful to protect relationships between the citizen and the national government . . . it would enlarge Congressional and judicial control of state action and multiply restrictions upon it whose nature, though difficult to anticipate, would be of sufficient gravity to cause serious apprehension for the rightful independence of the local government." *Hague,* supra at 520 n. 1.

case *sub judice* it is clear that the action of the state has cut into the very heart of respondents' relationship with the national government, by depriving them of full enjoyment of federal laws and regulations which were enacted for their benefit.

In its brief, petitioner contends that respondents' claim under the Supremacy Clause (Art. VI, § 2) is not constitutionally cognizable under § 1983, since the Supremacy Clause secures no rights to the individual and that the asserted right of which respondent has allegedly been deprived is one arising solely under federal statute. (Brief for Petitioner, p. 9). Amicus does not question the Supremacy Clause's function as the judicial implement for invalidating state legislation which is repugnant to the Constitution and validly enacted federal laws. The Supremacy Clause, far from being a mere "structural principle of federalism" (Brief for Petitioner, p. 9), espouses the fundamental contract between the people and their national government. This contract supplanted the tendentious confederation of separate states and gave the people the right to direct protection and full enjoyment of the laws of the national government. This Court has long recognized that the Supremacy Clause prohibits state interference with the people's right to such pro-

tection. See, e.g., *Gibbons v. Ogden,* 9 Wheat 1 (1824); *Nash v. Florida Industrial Commission,* 389 U.S. 235 (1967). In the area of federal social legislation this Court has insisted that even under the "cooperative federalism" that the AFDC system represents, *King v. Smith,* 392 U.S. 309, 316 (1968), states must adhere to the Supremacy of federal legislation conferring benefits upon American citizens. *Goldberg v. Kelly,* supra; *Dandridge v. Williams,* 397 U.S. 471, 482-83 (1970).

Thus, in cases such as the one *sub judice,* the deprivation, in a very real sense is *both* constitutional and statutory, with the ultimate deprivation being constitutional by its substance.[5]

By their complaint respondents contended, *inter alia,* that the petitioners' policy of prorating shelter and utility needs were in violation of certain federal regulations; (App.

5. We note with interest this Court's decision in *Baker v. Carr,* 369 U.S. 186 (1961). In that case petitioners contended, *inter alia,* that an apportionment statute of Tennesse was an unconstitutional deprivation of their constitutional right to equal protection of the laws. The three-judge district court dismissed this complaint for lack of jurisdiction. On appeal, this Court reversed the dismissal of their complaint, and in so doing was careful to point to the distinction between a dismissal for lack of jurisdiction and nonjusticiability. *Baker v. Carr,* supra at 198. The action was founded on § 1983, with the district court's jurisdiction being invoked pursuant to 28 U.S.C. § 1343 (3). The analysis of the Court as to whether the allegations of appellant's complaint constituted a non-justiciable contorversy exhaustively treated cases where the allegation of deprivation was brought directly under Article IV § 4 of the Constituion (republican form of government). While this Court found such cases to typically raise non-justiciable political questions, it did not, significantly we believe, find that the invocation of such a right is without the subject matter jurisdiction of the Court, but found that they present questions which although are "not wholly and immediately foreclosed" *Baker v. Carr,* supra at 198, their substance generally

p. 11)[6] and in conflict with 42 U.S.C. § 602 (a) (23). (App. p. 12). For this reason, respondents sought injunctive relief enjoining petitioner from continuing to implement this system, which they alleged was in violation of the pertinent federal laws governing the same. Of course, this is the essence of a claim founded upon the Supremacy Clause, Article VI, § 2.[7]

The substance of these allegations is, of course, that the petitioner has acted in such a fashion to deprive respondents of their right to the full use, benefit and enjoyment of the controlling federal laws; a claim which *Amicus* submits is a privilege and immunity within the scope of the fourteenth amendment, for which a cause of action is provided under 1983, and jurisdiction lies in the federal court under 28 U.S.C. § 1343 (3).[8] See e.g., *Hague v. Committee for Industrial Organization,*

leaves the Court unable to protect the "right" asserted. *Id.,* at 198. If, as the Court's decision in *Baker* would seem to indicate, that a claim under the Guaranty Clause would be sufficient to establish subject matter jurisdiction, in the sense of a deprivation of a constitutional right, within the meaning of §§ 1983 and 1343 (3), it seems incongruous to hold that the same would not be true for claims founded upon the Supremacy Clause.

6. 45 C.F.R. § 233.20 (a) (3) (ii).

7. And, such is the case "whether or not the complaint specifically invokes the Supremacy Clause." *Swift and Company v. Wickham,* 382 U.S. 111, 123 N. 18 (1965).

8. Considering the significance of the constitutional deprivation, it becomes of relatively little importance whether the *statutory* deprivation is of a "right" or a "privilege" since it is now well established that the state's enactment may not be saved "from constitutional infirmity on the ground that the [statutory deprivation] . . . [is] not of a 'right' but merely a 'privilege' ". *Sherbert v. Verner,* 374 U.S. 398, 404 (1963). Also see, *Goldberg v. Kelly,* 397 U.S. 254, 261 (1970).

supra. Accordingly, *Amicus* submits that the respondents properly invoked the jurisdiction of the district court under 28 U.S.C. § 1343 (3).

II.

CONCLUSION

For the foregoing reasons, this *Amicus* respectfully submits that the respondents properly invoked the jurisdiction of the lower federal courts under 28 U.S.C. § 1343 and that the decision of the Court of Appeals on the merits should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing Brief Amicus Curiae of East Texas Legal Services, Inc., has been forwarded to all counsel of record in this cause by depositing the same in the United States mail, postage prepaid on this the 2nd day of June, 1978.

ROBERT B. O'KEEFE
Attorney for East Texas Legal Services, Inc.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1977

* * *

NO. 77-719

* * *

JEROME D. CHAPMAN, COMMISSIONER OF THE TEXAS DEPARTMENT OF HUMAN RESOURCES, ET AL.,

Petitioners

v.

HOUSTON WELFARE RIGHTS ORGANIZATION, ET AL.,

Respondents

* * *

BRIEF OF AMICUS CURIAE STATE OF HAWAII IN SUPPORT OF PETITIONERS' BRIEF ON THE MERITS

* * *

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* * *

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The State of Hawaii (hereinafter "Hawaii") respectfully submits this brief *amicus curiae*, pursuant to Supreme Court Rule 42 through its Attorney General, Ronald Y. Amemiya, by counsel of record, Michael A. Lilly.

INTEREST OF AMICUS

Hawaii participates in all of the public assistance programs for which Federal funds are made available under the

Social Security Act (hereinafter "Act"), as amended, 42 U.S.C. § 601, *et seq.*[1] Like Petitioners (hereinafter "Texas") and the 51 other jurisdictions receiving such funds to strengthen and improve their Aid To Families With Dependent Children (hereinafter "AFDC") programs, Hawaii, in compliance with the Act and implementing Federal regulations, has submitted and received the approval of the Secretary of Health, Education and Welfare for its State plan. Included in that plan are provisions for determining who are eligible for AFDC assistance and the amount of assistance they are entitled to receive.

One-half of the approximately $6,858,000 necessary to provide assistance to Hawaii's 18,258 AFDC cases in the month of March 1978, came from Federal funds available under the Act. In the Fiscal Year 1976-1977, $73,901,426 were spent to provide AFDC assistance to 17,020 cases; by the close of the current fiscal year, approximately $82,253,578 will have been used to provide assistance to a monthly average caseload of 18,175.

As a full participant in all of the Act's public assistance programs, Hawaii has a keen interest in settling both the substantive and jurisdictional questions raised by Texas' request for this Court's review by *certiorari*.

The substantive issues raised by Texas are particularly timely. Hawaii's own flat granted AFDC standard for shelter and utilities is being challenged in the United States District Court for the District of Hawaii *vis-a-vis* 42 U.S.C. § 602(a)(23).[2] Although the claim of improper proration is not raised in the action against Hawaii, the question as to whether it is ever proper under 42 U.S.C. § 602(a)(23) to lower the standard of assistance is the key issue.

Resolution of the jurisdictional dispute is also of extreme importance to Hawaii. The State of Hawaii has urged the United States District Court for the District of Hawaii to

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[1] These programs include the Aid To Families With Dependent Children (Title IV), Supplemental Security Income (Title XVI), Medicaid (Title XIX), and Social Services (Title XX).

[2] *Tupua, et al. v. Chang, et al.*, Civil No. 75-0404 (D. Hawaii).

adopt the position of the United States Courts of Appeals for the First, Second, and Third Circuits, namely, that Federal jurisdiction for challenges to state implementation of welfare programs established under the Act is cognizable under 28 U.S.C. § 1331 and not 28 U.S.C. § 1343.

In the last several years suits challenging Hawaii's system for providing public assistance to needy persons have consistently alleged that non-compliance with Federal statutory and regulatory welfare program provisions constitutes a violation of the Supremacy Clause of the United States Constitution. In some instances, suits have appended thereto the allegation that such non-compliance also constitutes or results in violations of the respective plaintiff's or plaintiff-class' rights under either or both the Due Process and Equal Protection Clauses of the Fourteenth Amendment of the United States Constitution. Jurisdiction in these cases has been predicated upon 28 U.S.C. §§ 1331 and 1343, or only § 1343.

In disposing of the jurisdictional issue, the Hawaii District Court has ruled that jurisdiction is properly conferred upon it under 28 U.S.C. § 1343, without discussing whether the plaintiff or plaintiff-class has raised a colorable constitutional claim. The actions have been characterized as "1983 actions," notwithstanding the fact that the District Court has, in most cases, not reached the claims premised on the Fourteenth Amendment; rather, it has confined itself to hearing and deciding only the issues arising under the Supremacy Clause.

Hawaii is gravely concerned about the jurisdictional holding of this line of cases. As a participating state, open to public scrutiny of its methods of implementing the Act, Hawaii can only anticipate that the jurisdictional controversy will continue to plague future cases in the District Court. If, however, the jurisdictional issue is resolved here, the need to waste valuable judicial time pointing out the difference between the opinion of the Hawaii District Court and the opinions of the First, Second, and Third Circuits will be obviated.

There is also an urgent need for Supreme Court discussion of whether mere allegations of Fourteenth Amendment claims, particularly in the area of challenges to state welfare programs premised on violation of the Supremacy Clause wherein resolution without discussion of the equal protection or due process claims provides full relief to the plaintiff, constitute a substantial constitutional claim for purposes of conferring 42 U.S.C. § 1343 jurisdiction on the Federal courts.

ARGUMENT

Texas has presented three questions for review by this Court. The State of Hawaii specifically incorporates herein and joins with Texas in each of its arguments urging this Court to find that the District and Circuit Courts lacked jurisdiction to entertain Respondents' claims under 28 U.S.C. § 1343, and that the Court of Appeals erred and improperly intruded into a state's right to establish a standard of need for determining eligibility for the AFDC program it is charged with administering under the Social Security Act.

CONCLUSION

Having considered the arguments set forth in Texas' Brief on the Merits, as well as the particular and joint concerns of Hawaii, as *amicus curiae*, this Court should rule that the claims raised by Respondents do not rise to the level necessary to authorize enforcement in Federal court pursuant to 28 U.S.C. § 1343.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, MICHAEL A. LILLY, Deputy Attorney General of Hawaii and a member of the Bar of the Supreme Court, do hereby certify that three copies of the foregoing Brief for Amicus Curiae, State of Hawaii, have been served on Petitioners and Respondents by placing same in the United States Mail, certified postage prepaid, addressed respectively as follows: Mr. David H. Young, Assistant Attorney General, State of Texas, P.O. Box 12548, Capitol Station, Austin, Texas 78711, Petitioners; Mr. Jeffrey J. Skarda, 2912 Luell Street, Houston, Texas 77093 and Mr. John Williamson, Texas Rural Legal Aid, 305 E. Jackson Street, Suite 122, Harlingen, Texas 78550, Respondents, on this 2 day of June, 1978.

Michael A. Lilly

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see

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